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CSABA VARGA*

The Quest for Formalism in Law

Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion

Abstract. After the relationship between form and content in art and law is surveyed and the axiomatic approach to systemicity in both philosophy and law of both the classic and modern ages is scrutinised, the want of axiomatisability–in presence of correlations between axiomatism and law notwithstanding–is established. The very nucleus of any axiomatic system is that in some set of building blocks there are few foundation stones from which one given overall building can be built up in one given form and with the inherent necessity of that the operation, in the security of reaching the same end result, can be repeated by any actor at any future time. However, the relationship amongst the constituents of legal systems is not such as to allow to make up their edifice in exclusively one form, only if the procedure is defined and some constituents as foundation stones are designated. For legal systems are truly dynamic systems thoroughly built on substantive interconnections. Therefore they resist–albeit idealise–axiomatisation. In consequence, exclusively the heuristic value of the axiomatic ideal can be fully implemented and scholarly realised in the domain of law.

Keywords: form, content, substance; philosophy, aesthetics; Hegel, Marx, Lukács; mos geometricus; legal concepts, law-codes

Formalism is a recurrent topic in debates on law without, however, its components being analysed to the adequate depth. In the English-speaking legal world it takes precedence as the duality or antagonism of form and substance[1] the fact notwithstanding that its origins in philosophy have once

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[1] For some classics, see Kennedy, D.: Form and Substance in Private Law Adjudication. *Harvard Law Review*, 89 (1976) 8, 1685–1778; Atiyah, P. S.: *Form and Substance in Anglo-American Law*. Oxford–New York, 1987; Summers, R. S.: *The Jurisprudence of Law's Form and Substance*. Aldershot–Brookfield, 2000. For some recent papers, cf. also Epstein, E. J.: Codification of Civil Law in the People's Republic of China: Form and Substance in the Reception of Concepts and Elements of Western Private Law. *University*

been formulated–as they continue on being termed in the European continental culture–in the dichotomy of form and content.

I. Systemicity

1. Form and Content

(In Arts and Law) Facing the challenge of how to define literature and above all poetry as its subject, the American New Criticism came to recognise the essential moment in the phenomenal form of human objectivations, with decisive significance granted to the arrangement of contentual elements in some selected way. With the fresh and almost neophyte impulse of the movement, *Austin Warren* answered the underlying issue by claiming that poetry is *reducible to the methods it uses*.[2] Such a reply by one of today's classics (thanks to the *Theory of Literature* he co-authored with *René Wellek*[3]) is rather thought-provoking on account of its conciseness. What is even more striking is its one-sidedness augmented by its express simplicity. True, this is barely more simplified as compared to the one-sidedness in the opposite sense of the old formula, held universally valid in abstraction from any real connection, according to which content and form are reflexively co-existent. For the New Criticism opposed in fact the absolutism of contents, claiming that form can also become the generator of contents, at least in some specific domains of human artificiality with arts and law included, among others.

With human objectivations, formal moments may carry on various features and serve a variety of functions. As known, *Hegel* had once differentiated as *external* forms those components that can be utterly incidental to *internal* ones while also indifferent to the definition of the subject. "In a book, for instance,

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of British Columbia Law Review, 32 (1998), 153 et seq.; Katz, L.: Form and Substance in Law and Morality. *University of Chicago Law Review*, 66 (1999) 566 et seq.; Madison, A. D.: Tension between Textualism and Substance-over-Form Doctrines in Tax Law. *Santa Clara Law Review*, 43 (2002–2003), 699 et seq.; Bigler, C. S.–Rohrbacher, B.: Form or Substance: The Past, Present, and Future of the Doctrine of Independent Legal Significance. *Business Law*, 63 (2007–2008), 1 et seq.

[2] Warren, A.: Literary Criticism. In: Foerster, N. (et al.): *Literary Scholarship. Its Aim and Methods*. Chapel Hill, 1941, in particular at 143. Cf. also Rákos, P.: *Tények és kérdőjelek*. Tűnődés az irodalmon [Facts and question marks: contemplations on literature]. Bratislava, 1971, 17.

[3] Warren, A.–Wellek, R.: *Theory of Literature*. New York, 1949.

it certainly has no bearing upon the content, whether it be written or printed, bound in paper or in leather."[4]

In everyday life, formal moments play often the role serving as a criterion in distinction. Properly speaking, they may, by affording the *differentia specifica*, provide an outer sign identifying the subject and thereby lending it a proper denomination, certainly without playing any decisive role in shaping its substantial properties. In case of some metals, for example, defining specific gravity by indicating the proportion of weight to volume offers an easy way of differentiation. Moreover, a complete taxonomy can be achieved this way, without the criterion applied being able to furnish any information about the sorts of materials classified, besides serving with a merely pragmatic order helping classification in practice. In such cases, the distinctive role played by formal features, less significant in themselves, may perhaps be primarily explained by the particular relation of object to subject in everyday life, notably by the outstanding importance of the object's given features to the very subject.

Formal features may promote the certainty of recognition and designation anyway. In everyday practice, by mentally anticipating some contentual definitions issuing from a generalised experience we can select out any object classified according to and identified by its particular formal appearance. However, in case of law or literary work, mere phenomenal forms are not simply external(ised) properties or characteristics of the object in question, attached to it constantly or temporarily in a historically sanctioned manner. Anything appearing as a legal form (organised at a given hierarchical level through given procedures and methods) is only an external expression of deeper social relations and interests, that is, of material contents. Nevertheless, this very form represents and also embodies the contents expressed, moreover, by becoming an alienatingly reified entity, it may even master it.[5] And almost the same can be told of literature, too.

(In German Philosophysing) Projected onto human objectivations, we may thus safely state the form being–instead of "a kind of envelope which

[4] By Hegel, G. W. F.: *Logic*. Oxford, 1975. <http://www.kern-ep.de/Internet/Hegels_Logik/appearan.htm> and <http://www.marxists.org/reference/archive/hegel/works/sl/slappear.htm#SL133_1> Also *Enzyklopädie der philosophischen Wissenschaften* im Grundriss [1817], § 133n. <http://pedagogie.ac-toulouse.fr/philosophie/textes/wl131.htm>.

[5] Cf., by the author: 'Thing' and Reification in Law. In his *The Place of Law in Lukács' World Concept*, Budapest, 1985, ²1998, Appendix, 160–184.

'contains' the 'content' "[6]–an organic medium of contents, without which the latter could hardly be more than dead abstraction, facing the risk of switching repeatedly into something else. This is by far not a new realisation. *Hegel* already formulated the *dialectic identity* of contents and form in a radical manner explicating that "the content, as such, is what it is only because the matured form is included in it", "So it comes about that the form is Content: and in its phase is the *Law of the Phenomenon*."[7] Following this course of development, neither the founders of *Marx*ism did content with merely establishing the mutual transubstantiation of contents and forms into one another but also found that an overwhelming role is being played by the former. However, not even within that tradition contentual priority must amount to nihilising the form. For, according to *Lukács*, "the specific examination of the form is by no means something unnecessary and even less a problem the exploration of which were [...] opposed to the method of the dialectical and historical materialism."[8]

Returning to the starting point, the original objective of the New Criticism was to lead the formal organisation of contents back to the role it is due, of those contents which cannot indeed be but the outcome of such an organisation. By such a realisation the *"heresy of paraphrase"* become one of the central concerns of the New American Criticism. For, obviously, the production of some literary "contents" through non-literary "formless" means would deprive the outcome exactly of its specific quality. Due to its normatively posited character, the legal form too is strictly inseparable from all its underlying contents. Otherwise speaking, no contents can be asserted as specifically legal unless organised in/into a legal form. From this perspective, it is quite indifferent how we do appreciate the apparent antagonism between the law's positivistic and sociologistic approaches in describing what role of container we ascribe to legal form and what criteria we set to it. Irrespective of whether the legal form is generated as a text through previously defined procedures or as selected out from the actual practice (jurisprudence) of judicial organs or even if–ideally–it encounters both options to reach their synthesis, all show the emphatic

[6] Brooks, C.: *The Well Wrought Urn. Studies in the Structure of Poetry.* New York, 1947, 192, in which case "the 'form' [is] conceived as a kind of container, a sort of beautified envelope" (226), albeit (as continued on 197) "form and content, or content and medium, are inseparable."

[7] Hegel, § 133n and 133. <http://www.kern-ep.de/Internet/Hegels_Logik/appearan.htm> and <http://www.marxists.org/reference/archive/hegel/index.htm> and <http://pedagogie.ac-toulouse.fr/philosophie/textes/wl131.htm>.

[8] Lukács, G.: *Über die Besonderheit als Kategorie der Ästhetik.* Berlin–Weimar, 1985, 156.

formalism in anything coming into being as "distinctively legal".[9] Or, the "paraphrase" of generating alleged legal contents through extra-legal means could only result in the loss of the law's specific quality: failure in form ending in evaporation of substance, i.e., juridicity.

Consequently, what is at stake here is not simply "dialectic" identity. In addition, it also involves certain condensation of what makes its overall substance. In summary of his studies in *Hegel, Lenin* could only reassert that "Form is essential. Essence is formed. In one way or another also in dependence on Essence".[10] The form's essentiality can be varying in diverse types of human–societal–objectivation. For example, relating to the aesthetical quality of a work of art it has been found that "giving a form is the genuinely decisive principle while the aesthetical processing of contents is only preliminary to it, meaning but little artistically as stopping there could result–instead of some poorer artistic performance–nothing in the least in an aesthetical perspective." Although "this lack of independence [...] does not change the priority of contents", all this is suitable to show "the form's decisive, independent, finishing function on the work."[11] The basic relationship between contents and form is not different in law either. For the processing of contents to be objectivated as a law, preceding the act of giving it its due form, is theoretically nothing else than "preparatory work [...] which–as by itself it does not produce anything legally significant, valuable or valid–gains a normative character and strength, i.e., legal normativity, exactly in this particular legal formulation", as actually no kind of "legal-normative quality and significance" can arise preceding "the actual form-giving phase of the law-making process".[12]

Or, this emphatic significance attributed to formalism in law may not have been emerged by chance in history, as "all the needs of civil society–no matter which class happens to be the ruling one–must pass through the will of the

[9] For the duality of how to understand legal form (either as the law's internal criterion or external description) and the need and availability of a synthesis, see, by the author: Quelques questions méthodologiques de la formation des concepts en sciences juridiques. *Archives de Philosophie du Droit,* 18 (1973) 205–244. The term 'distinctively legal' is used by Selznick, P.: The Sociology of Law. In: *International Encyclopedia of the Social Sciences,* 9, ed. D. L. Sills, New York, 1968, 51 et seq.

[10] V. U. Lenin's Annotations on Book II (Essence) of Hegel's *Science of Logic* in his *Filosofskie tetradi* [Philosophical notebooks] in his *Collected Works* 38. Moscow, 1960–1967. 129–164. <http://www.marxists.org/archive/lenin/works/1914/cons-logic/ch02.htm>.

[11] Lukács: *op. cit.* 238 and 240.

[12] Peschka, V.: *Jogforrás és jogalkotás* [Source of law and law-making]. Budapest, 1965, 354, 360 and 357.

state in order to secure general validity *in the form of laws*."[13] As proved by the example of bourgeois society, this significance is rooted in the nature of law, that is, on the final account, in the very nature and underlying relations of a society within which the objectification of the fundamental relationships and needs has become the primary condition of survival. The human will getting expressed in laws is socially conditioned in view of both their contents and form. "The individuals who rule in these conditions [...] have to give their will [...] a universal expression as the will of the state, as law", because "Just as the weight of their bodies does not depend on their idealistic will or on their arbitrary decision, so also the fact that they enforce their own will *in the form of law*, and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will."[14] Or, the increased significance given to the *actual form* of expression involves, too, that the shaping of substance–not in any but in one given and exclusively in that given way–is no longer an external finishing but has itself been transformed into a *substantial property*, taking a share in the very substance of the subject, which will enter the scene as the given organisation of contents, moreover, as the substantive moment of the organised contents.

In addition to the need of the ruling class to express its will in form of laws, the same authors took a stand in their *German Ideology* also on the inherent consequences and side-effects all the above have at the level of both social and individual consciousness. For such objectified expressions as "their relations assume an independent existence over against them" as "the forces of their own life become superior to them" and, embodied by concepts, they offer large scope to "illusion" that may conceal or cover up their original determination and contents; for "Idea of law. Idea of state. The matter is turned upside-down in *ordinary* consciousness."[15] However, this upside-down turn is by far more than a mere appearance, a false image in consciousness that may appear as a specific distortion "in ordinary consciousness." In the case of law as a formalised objectivation through institutionalisation, it is "the matter" itself that is turned upside-down: as a result of objectification, a *ew quality* may emerge that *sublates* the old one (negating while retaining it), with the perspective of detaching itself from it on principle. To be sure, the formal side of legal objectivation is granted a stressed and essentialised significance just for the reason that once objectification is perfected, it will have gained own existence

[13] Engels, F.: *Ludwig Feuerbach and the End of Classical German Philosophy*. <http://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm>.

[14] <http://www.marxists.org/archive/marx/works/1845/german-ideology/ch03j.htm>.

[15] <http://www.marxists.org/archive/marx/works/1845/german-ideology/ch01c.htm>.

independent of its genesis, that is, in order that it can be applied–even if turned against its original determination, and preventing any criticism as may be for contents–as a means of social regulation, a pattern of behaviour with indisputable validity.

Accordingly, the *"enchantment"* of social relations through their transformation into legal form can also be recognised in the imperfection of their translation into abstract rules and in the latter's deliberately simplifying tendency.[16] "Enchantment" gets completed when social relations transcribed into legal contents will have already lost their original–primary–essentiality, sublated into a new quality.

Hegel encountered the specifically emphatic role of form where an *appropriate* form was needed, that is, with works of art, where "So far is this right form from being unaffected by the content that it is rather the content itself."[17] Or, there is a need for appropriate form in law, too, at least partially and in a restricted sense. This is the very problem of paraphrase. But certain elements of difference have also to be highlighted. Namely, the form appropriate in *aesthetical quality* is the individual form of a unique work of art, a concrete totality with a set of formative elements having organised the contents, that may have generated aesthetical quality in its uniqueness. In contrast, the form appropriate to legal quality is less unique and concrete. Otherwise expressed, to reach an aesthetical quality, the form has to be regenerated in a concrete and individual manner; for if anyone only "makes the aesthetical *a priori* of the acquisition and formation of reality",[18] will be incapable of creating any genuinely aesthetical quality. That is to say that the field of aesthetical quality is not formalised. There are no standardised forms there. As opposed to it, granting a specifically *legal form* is the normative *a priori* of the formation. It is indeed the schematic form or blanket formula that makes any formation transubstantiated into a legal quality as distinguished from anything else.

2. *Systemicity and Axiomatic Approach*

(The Idea of System and the Law-codes) It is the law-code's *systemicity* as an externally distinctive mark that characterises its technological and instrumental novelty both comprehensively and substantively. Systemicity as a formal

[16] For an expressive description, see: Szabó, I.: *Les fondements de la théorie du droit.* Budapest, 1973.

[17] <http://www.kern-ep.de/Internet/Hegels_Logik/appearan.htm>.

[18] Lukács: *op. cit.* 159.

criterion forms a bridge between the historical proto-forms and the modern implementations of the ideal of codification. By breaking up the envelope of conceptuality and revealing its individual and particular (historical) layers (as in *Henrik Ibsen*'s drama *Peer Gynt* did), systemicity will remain the very core of any conceptuality as its innermost domain. Or, this is the *differentia specifica* of one of the law's paths and ways of getting objectified, its *sine qua non* property.[19]

Namely, systemicity as a technical term is in a position rather to suggest than to specify given contents. For systems can be constructed on different levels with differing structuration and complexity, with degrees of materialisation varied in "maturity" and "perfection". For the time being, the analysis of natural dynamic systems not having extended conventionalisedly onto linguistic and intellectual ones, general systems theory cannot yet offer a comprehensive definition to it. Nevertheless, its notion is suitable to reflect the heterogeneity of systemic contents. According to a minimum concept, "A *system* is a set of units with relationships among them." Or, "A system is a set of objects together with relationships between the objects and between their attributes."[20] According to a more sensitive and stricter definition, covering linguistic-theoretical systems as well, "A system is: (1) something consisting of a set (finite or infinite) of entities: (2) among which a set of relations is specified, so that (3) deductions are possible from some relations to other or from the relations among the entities to the behavior or the history of the system."[21] There is a significant difference in degree between the two definitions above, although both represent dynamic systems that can be found in both natural and social reality. Considering the depth of internal coherence, interdependence

[19] Cf., by the author: Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica*, 47 (2006) 2, 89–117.

[20] Bertalanffy, L.: General System Theory, and Hall, A. D.–Fagen, R. E.: Definition of System. In: *General System Yearbook*, 1 (1956), 1–10 and 18–28 and <http://isss.org/projects/general_system_yearbook>. Cf. also Uemov, A. I.: Sistemy i sistemnye issledovannia [Systems and systemic research]. In: Blauberg, I. V. (ed.): *Problemy metodologii sistemnogo issledovania* [Problems of the methodology of systemic research]. Moscow, 1970, 68. By adding "purposeful formation" as a common generic concept, a similar definition was in fact proposed by Sadovskij, V. N. in his K voprosu o metodologicheskikh printsipah issledovania predmetov, predstavliaiushchij soboi sistemy [On the question of the methodological principles of the investigation of subjects presupposed by their system]. In: Suchotin, A. K. (ed.): *Problemy metodologii i logiki nauk* [Problems of the methodology and the logic of science]. Tomsk, 1962.

[21] Rapoport, A.: General Systems Theory. In: *International Encyclopedy of the Social Sciences*. 15, ed. New York, 1968, 452–453.

and self-closure, their difference is by far not in degree but one resulting in new quality with those conceptual systems which, due to their logically exhaustive deductivity, are indeed axiomatic systems.

For there is *hierarchy* among systems. The minimum is perhaps the state when some loosely co-related aggregation of objects is scarcely interlaced by affinities and when the centripetal forces cementing the system together are hardly capable of anything more than neutralising centrifugal forces. The maximum may be the state when each and every element of a system is tied to all the other ones so closely that owing to their multiple mutual intertwinings, each of them will by its very existence strengthen the other, while withdrawing any element(s) out of–or, properly speaking, any change made in–the system would necessarily collapse the entire system. Thus the course of *systemic development* ranges from some rudimentary stage to the state of *axiomatisation* completed. It is not by chance that *Euclid*'s *Elements* has ever served to embody the ideal of law-codification in modern times. Within the scope of the classical model, "[t]he terms belonging to the theory are never introduced into it without being previously defined; the theses are developed in the theory only after having been previously proved, except for a small number of them which are laid down as principles in the beginning: this way the proof cannot be extended to the infinity but has to be founded on some primary theses which have been selected excluding any doubt regarding their conceivability in a healthy spirit. And although anything proposed is empirically certainly true, no reference is made to experience in justification: the geometer pursues only a demonstrative route, founding his proofs exclusively onto what has been previously proposed, while taking into consideration nothing but the laws of logic. This way, any theorem is connected with the chain of necessity to such theses from which it has been deduced as a consequence, until a strictly enclosed network is gradually reached, in which all theses are directly or indirectly interconnected to be eventually concluded in a system, of which not any single part could be withdrawn or modified without the whole being destroyed."[22]

In law, as early as in proto-forms, *codification* aimed at written recording of the law through its systematic elaboration. The quest for a systematic restatement of laws in one textual body emerged historically as functionally bound, and its social objectives always thematised the perspicuity and conclusion of regulation by its self-closing. Later on, hierarchical structures were built in, using a pyramidal construction. The lawyer, the jurisprudent and the legal philosopher were mostly led by other motives than inertia moment,

[22] Blanché, R.: *L'Axiomatique* [1955] 5[e] éd. Paris, 1970, 9–10.

instinct to self-development or pragmatic consideration on how to fulfil the ideal–or fall in trap–of axiomatism. Throughout history, the conception formed on the availability of axiomatic (re)construction through law codification had been closely connected with the idea of (re)structuring legal and social reality.

(Early Modern Times) Although it was the 19th century to mature codification into a classical type, it was the 17th century to enhance ambitions to the law's *axiomatic (re)construction.* Through the discoveries by Kepler, Galilei, Harvey, Gassendi, Huygens, Newton and others, this was the century to attain decisive victory of natural-scientific world-view over mediaeval scholastic thought, proclaiming the triumph of human intellect in victorious self-assertion of middle classes at a time preceding their political success through revolution, and granting autonomy recognition to sciences during the *grand siècle.* The sciences themselves were unified according to mathematics' pattern, in a way to prompt *Galileo Galilei* to declare that the language of nature is set by the symbols of mathematics. In one of the milestones of human intellectual history, the *Discours de la méthode* (1637), *René Descartes* formulated his basic methodological tenets as follows: "The long chains of simple and easy reasonings by means of which geometers are accustomed to reach the conclusions of their most difficult demonstrations, had led me to imagine that all things, to the knowledge of which man is competent, are mutually connected in the same way and that there is nothing so far removed from us as to be beyond our reach, or so hidden that we cannot discover it".[23] Far from content with establishing mere structural similarity, *Descartes* applied his geometrical notion for mentally building up the philosophical-scientific universe on solid foundations through irrefutable principles, advancing step by step from the simple towards the complex. And just in the way as the stand of *cogito ergo sum* could become the cornerstone of *Cartes*ian rationalism, some maxims taken as universally valid could also substantiate the unfolding of law, while in political philosophy, based on the assumption of social contract, hypostatasing some natural state (by presuming isolated human beings without bonds of institutionally established trust amongst them) had to serve as starting point for reasoning.

Of course, *Cartes*ian rationalism was not launched in jurisprudence in a form achieved and completed like Pallas Athene, by one stroke and fully armed. *Descartes* himself, anticipating later developments, only accomplished the summation of progressive methodological tendencies already inherent in

[23] Descartes, R.: *Discourse on the Method of Rightly Conducting the Reason, and* Seeking Truth in the Sciences. 1637. <http://bdsweb.tripod.com/en/106.htm>.

his age. For starting by the 15th century, the progressing course natural sciences had been taking instigated jurists to lay the foundations of a new jurisprudence which could prove to be scientific, reliable and certain to the degree as the new science of *Newton* and *Copernicus* did. Accordingly, "many theorists wanted to ensure that choices among competing rights [were] constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that legal story [...] would have to be transformed from a religious fable into a scientific dissertation."[24]

Back in the early 17th century, *Johannes Althusius* investigated law in his *Dicaeologicae* (1617) as part of natural reality, undertaking to describe scholarly this specific part of reality. At the same time, he framed his notions–following the method of *Pierre de la Ramée*, i.e., the *Ram*ist logic–into a mathematical order. Thus his exposition was patterned by *Petrus Ramus* (in Latin),[25] who himself stood on the borderline between the Middle Ages and modern times.[26] Few years later, in 1625, *Hugo Grotius* erected in his *De jure belli ac pacis* a system of law, deduced with certainty that could only compare to conclusions reached in mathematics. For no doubt exists any longer for him. His law is quite autonomous a creature as "natural law has become the categorical imperative of creation";[27] and the proud words of its *Prolegomena* also reflect this unwavering confidence, freed from church theology and moral philosophy alike, only restricted by nature and common sense: "What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him."[28] This is how the axiomatic understanding of law and codification had gradually taken on a pure, theoretically sophisticated form; this is the way in which the great rationalising attempt by

[24] Walt, A. J.: Marginal Notes on Powerful Legends: Critical Perspectives on Property Theory. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* 58 (1995), 402.

[25] E.g. Merwe, D.: Ramus, Mental Habits and Legal Science. In: Visser, D. P. (ed.): *Essays on the History of Law.* Cape Town, 1989. 32 et seq.

[26] Cf. Villey, M.: *La formation de la pensée juridique moderne.* Paris, 1968, 588–589.

[27] Brimo, A. *Les grands courants de la philosophie du droit de l'État* 2e éd. Paris, 1968, 86.

[28] Grotius, H.: *De jure belli ac pacis.* [1625], Prolegomena, sect. II. <http://www.lonang.com/exlibris/grotius>. The explication continues by stating that "The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages."

modern jurisprudence to reformulate the law within a geometrically inspired system of law-codes was finished and consummated.

Namely, following the transition by *Althusius* and the breakthrough by *Grotius*, quite a few jurisprudents ventured the impossible by attempting to implement it. The oeuvres of *Weigel, Felden, Pufendorf* and others are the methodical schools of deductive system building. *Georg Wilhelm Leibniz* was one of them, responding to the historical challenge of axiomatism with the entire passion of a lifetime's overall oeuvre, almost identifying his personal vocation on Earth with the underlying issue in a way to exert an impact upon us with his failures as well, up to the present day.[29]

(Recent Times) True, the age of *Descartes and Leibniz* had passed once and for all, and *Cartes*ian rationalism lost its vitality as a philosophical system of its own, surviving–like other great heritages of human knowledge–no longer in its individuality but as integrated into our culture of the Western knowledge. Nevertheless, the attempt at axiomatisation was not just a historical adventure but a fundamental logico-methodological challenge to be faced by varying ages under differing conditions and scholarly predispositions. To be sure, it was not *Leibniz* the first and *Spinoza* the last who ventured transforming the language of philosophy into mathematics. One of the roughest, strikingly distorted versions of the aprioristic method as a "sublime nonsense, the most characteristic mass product of Germany's intellectual industry" practically flooded 19th century Germany with which, in preparation of launching the coming new epoch of positivism and empirism in scholarship, *Engels* too entered into passionate polemics.[30]

The revival (or renaissance) of axiomatism was accompanied by such and similar self-destructively sterile extremities, characterised by the brutal fact and inherent irony that, after all, it "yields nothing except a further image of itself. It is an elaborate tautology. Unlike numbers, words do not contain within themselves functional operations. Added or divided, they give only other words or approximations of their own meaning."[31]

[29] Cf., by the author: Leibniz und die Frage der rechtlichen Systembildung. In: Mollnau, K. A. (ed.): *Materialismus und Idealismus im Rechtsdenken.* Geschichte und Gegenwart, Stuttgart, 1987, 114–127.

[30] Engels, F.: *Herr Eugen Dühring's Revolution in Science. Anti-Dühring.* Moscow, 1947, 13.

[31] A passage continued by an idea dear to *Spinoza*: "Language is seen no longer as a road to demonstrable truth, but as a spiral or gallery of mirrors bringing the intellect back to its point of departure." Steiner, G.: *Language and Silence.* Essays on Language, Literature, and the Inhuman, New Haven–London, 1998, 20.

Or, the re-emergence of axiomatism with a renewed attempt at breaking down the law into an axiomatically erected system is encountered where and when a comprehensive methodological foundation, like the one once provided by the *Cartes*ian rationalism in 17th century, is made available. Such seems to be the case right in our mid-20th-to-early-21st century, when mathematical logic and cybernetics and legal informatics and e-government, as instruments of the ongoing second-to-third industrial revolution, are to recognise one of their forefathers in *Leibniz*; when *Marx* is referred to as one of the forerunners of mathematisation in social sciences;[32] when reasonable, moreover downright desirable attempts are made for both the computerisation of legal information and the cybernetic approach to law and its codification–with the risk of absolutisation, no need to add.[33]

In itself, the claim for the law's logical processing is by far not to lead necessarily to axiomatic system building. Nevertheless, the question of whether or not the law's formal reconstruction will necessarily imply axiomatic methodology arises at times, with the ensuing tendency to describe (or, rather to say: transcribe) legal operations in schemes of formal logic. The trend aiming at a complete and exhaustive formal logical reconstruction of the law's operations (usually referred to as formalist, in opposition to the anti-formalist direction)[34] does not exclude axiomatic reconstruction from the outset.[35] The very fact of a literary tradition of vague ideas and uncertain notions about axiomatisability in law is shown, for instance, by *Josef Esser* who, being far

[32] See, e.g., *Vospominaniya o Markse i Engelse* [Recollections on Marx and Engels]. Moscow, 1956, 6, quoted by Kazimirchuk, V. P.: *Pravo i metody ego izucheniya* [Law and the methods of its research]. Moscow, 1965, 166.

[33] Cf., only from the publications of the Viennese *Internationale Rechtsinformatische Seminare* at Salzburg, Schweighofer, E. (ed.): *Zwischen Rechtstheorie und e-Gouvernement, gewidmet Friedrich Lachmayer*, Wien, 2003 and Schweighofer, E. (ed.): *10 Jahre IRIS*. Stuttgart, 2007; as well as those titles including contributions by the present author as well, Schweighofer, E. (ed.): *Informationstechnik in der juristischen Realität. Aktuelle Fragen zur Rechtsinformatik 2004*, Wien, 2004, Schweighofer, E. (ed.): *Effizienz von e-Lösungen in Staat und Gesellschaft. Aktuelle Fragen der Rechtsinformatik*. Stuttgart, 2005, and Jakob, R.–Phillips, L.–Schweighofer, E.–Varga, Cs. (eds.): *Auf dem Weg zur Idee der Gerechtigkeit. Gedenkschrift für Ilmar Tammelo*. Münster, 2009 (forthcoming).

[34] For the basic controversy between anti-formalism and formalism, see the plenary session papers presented at the World Congress of the International Association for Philosophy of Law and Social Philosophy in Brussels in 1971, most eminently by Perelman, C.: Le raisonnement juridique, 1–15 and Kalinowski, G.: Le raisonnement juridique, 17–42, both in *Die Juristische Argumentation*. Wiesbaden, 1972.

[35] E.g., Kalinowski, G.: *Introduction à la logique juridique*. Paris, 1965.

away from formalism personally,[36] uses the dichotomy of "axiomatically oriented" and "problem-oriented" all along his work.[37] He conceives these opposites as synonymous to "closed system" presupposed by codification, on the one hand, and "open system" operating with case law, on the other.[38] – This same approach is solidified by *Julius Stone's* definite assertion, according to which "If a legal order were designed to contain within itself a sufficiently comprehensive set of legal propositions precise and stable enough in meaning so that only one answer could be deduced from them for every problem presented for legal solution, those who operated with it would need to use only formal logic. [...] Such a legal order would be an axiomatic system–an axiomatics–like geometry or algebra."[39] To be sure, logical conclusion does by no means presuppose an axiomatic structure, albeit by axiomatic character *Stone* exclusively means the logically operated nature of premises. His remark adds somewhat absolutistic a form to his thesis, claiming that "Clearly even the most axiom-oriented legal system will be only very imperfectly so, while even the most rhetorically, (that is, *tópoi*-) oriented legal order has within it numerous axiomatic sub-systems, some of its legal prepositions being apt for use as premises from which solutions can properly be deduced through stringent logical procedures. We are, indeed, accustomed to viewing a legal order as axiomatic to some extent, that is, as containing many major premises from which answers to legal questions can be deduced in a logically guaranteed way."[40]

Reverting to the German school of legal logic with strong axiomatic flavour, one of its most distinguished representatives, *Ulrich Klug*, treats both axiomatic system-building and the lawyers' desire for the law's axiomatic codification.[41] At the same time, he consistently avoids raising the dramatic issue, notably, its genuine feasibility. Apparently he is not even aware of the lack of deductivity from the law's notional structure and systemic components. On the final account and paradoxically, the only specific remark he has is echoing *Bochenski's* opinion on that every language, even if not elaborated, is

[36] Cf. Stone, J.: *Legal System and Lawyers' Reasoning*. London, 1964, 195.

[37] "A logically closed system–J. Esser writes in his *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*. 4th ed. Tübingen, 1990, 218–on the top of which there are deductively fertile major premises is axiomatically oriented." [„Ein logisch geschlossenes Rechtssystem, an dessen Spitze deduktiv ergiebige Obersätze stehen, haben wir als axiomatisch orientiert bezeichnet."]

[38] Esser: *op. cit.*, especially at 44.

[39] Stone: *op. cit.* 330.

[40] *Ibid.*, 332.

[41] Klug U.: *Juristische Logik*. 3. Aufl. Berlin, 1966, 15–16 and 174–176.

spirited by axiomatism.[42] – *Ilmar Tammelo* goes further in offering an answer when he criticises the view arising out of "blind obscurantism" which holds as if it were the mere self-centred wish of logicians to systematise law axiomatically. But in fact, when he answers that "it is up to legal policy to decide whether or not the axiomatisation of law shall take place without the logician having any competence. Yet once a decision is taken, the logician may help", he seems responding the enigma in terms of professional competence in scholarship rather than in terms of realisability in practice.[43] – Finally, *Ota Weinberger* treats axiomatism, too, as just one of logical methods, without entering into details as to its difficulties when applied to law. All he concludes is reduced to a blank prophecy, saying that "the logical analysis of legal thought is going to lead to the elaboration of pure deductive systems".[44]

In addition to renewed approaches to axiomatism in law,[45] there is a specific impetus that may have promoted axiomatism in the codes' systematisation of law. This is the systemic investigation into conceptual sets, launched rather as a requirement than as a modest achievement.

(Drawbacks in Philosophy) The tradition of systemic investigation into conceptual sets in philosophy is hardly sufficient for seconding the efforts in jurisprudence. Firstly, it concentrates on the analysis peculiar to philosophical systems. Secondly, drawing mainly on *Kant's Kritik der reinen Vernunft*,[46] both its issues and entire notional framework are inspired by the methodological limitations set by *Kant*ianism, old and new.[47]

As to the general systems theory and similar interdisciplinary trends, they are mostly preoccupied with dynamic systems in material and social reality. Consequently, conceptualisation in actual systems is secondary for them, seen mostly as a program to be addressed, if at all, in future.

Considering the fact that neither theory of science nor scientific methodology have made striking progress on the field, formal logic has remained in charge of conducting research on conceptual systems. And indeed, logic can successfully

[42] Bochenski, I. M.: *Die zeitgenössigen Denkmethoden*. 2. Aufl. München, 1959, quoted by Klug, 16 and 174.

[43] Tammelo, I.: *Rechtslogik und materiale Gerechtigkeit*. Frankfurt am Main, 1971, 48.

[44] Weinberger, O.: *Rechtslogik*. Wien–New York, 1970, 362.

[45] E.g., Ferrajoli, L.: *Teoria assiomatizzata del diritto*, Parte generale. Milano, 1970 as well as Wróblewski, J.: Axiomatization of Legal Theory. *Rivista internazionale di filosofia del diritto*, 49 (1972) 3. 380–389.

[46] Kant, I.: *Critique of Pure Reason* [Kritik der reinen Vernunft, 1781].

[47] See, e.g., Bartók, Gy.: *A 'rendszer' filozófiai vizsgálata* [Philosophical investigation of the 'system']. Budapest, 1928.

utilise its entire store of analytic instruments for systems research; the terrain, however, where it can make full use of its properties to achieve results suited to such a purpose is but its most narrow field, notably, axiomatics. Therefore the circumstance that research in conceptual systems is carried out unchangedly within the competence of logic has eventually deformed research itself, by diverting it onto the forced path of axiomatics. Thereby the very method of analysis creates an object for itself. Firstly, it addresses the subject with means and approach alien to the subject's own specificity. Secondly, this discrepancy with latent antinomy in between subject and approaching to it gets expressed in the subject's manipulation, equalling to distortion and falsification. Thirdly, axiomatism prevails with a subject transubstantiated. Or, what may have initially been a legal system, a mobile and dynamic conglomerate of both logical and alogical components, is going to eventually become a series of deductive conclusions, rigidified and broken into a construction unfolded and crystallised by the manipulator's axioms.

II. Axiomatism

1. The Want of Axiomatisability

(From Deductivity to Axiomatisation) For an external observer, human knowledge appears in form of written texts, involving a definite store of concepts with relations established amongst them. These texts contain pieces of information at various levels. Propositions and the linguistic units carrying them textually are formulated not inordinately but as organised according to a given order, mutually co-related as components of a well-constructed intellectual system. The order manifested in such texts is neither self-determining nor set for itself. It is designed to represent the connections of the object which the text has to express on a conceptual level. However, the underlying order may have concurring notional representations. For the representation to be adequate, its basic substantive features need to be identical. Or, the notionally schemed order has to be partly natural yet partly artificial, reconstructed and constructed at the same time.[48]

[48] In its time, the Soviet philosophical literature elaborated the thesis of *correspondence* between formal and contentual components, and called it the principle of "parallelism of form and contents of thought". Accordingly, their *parallelism* was thought to be based upon the relative independence of both sides with exclusive operations within their basic correspondence. Shtshedrovitskiy, G. P.–Alekseev, N. G.: Printsip parallellizma 'formy i

In case the components of a system are grouped in a way that its theses are logically to conclude from one another as necessary consequences, both their connection and the system itself qualify as *deductive ones.*[49] The further development of deductive systems by re-formulating them at a qualitatively higher level leads to *axiomatisation.* As a strictly consequent formal perfection of the deductivity of systems, axiomatisation amounts to the formal description (or reconstruction) of an already established system, elaborated exclusively in a deductive order. Axiomatic reconstruction is achieved through *meta-language* formulation of theses specified in *object-language* provided by the underlying system. Its phases are rather strict as to the conditions to be met. At first, (1) the basic signs to be applied in the system are defined, followed by (2) the definition of the formulas suitable to provide the expressions of the system, then followed by (3) the selection of the basic propositions *(axioms)* from the formulas defined above as well as by (4) the determination of the (deductive) rules of inference (or derivation) to be accepted in the system, and finally, to be ended by (5) the conclusion of all the theses *(theorems)* provable within the system, according to the same accepted rules of inference.[50]

(Futile Approximations at the Most) By projecting the *Aristotle*-inspired definition of *axiomatic systems*[51] onto the law after having performed the necessary substitutions,[52] we do reach the conclusion according to which the law can be conceived of and also treated as "a system *S* of normative concepts and propositions, whose property is that (a) all theses of *S* relate to the same domain of human behaviours and the relations among such behaviours; (b) all

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soderzhaniia mysleniia' i ego znachenie dlya traditsionnyh logicheskih i psihologicheskih issledovanij [The principle of parallelism of 'form and content of thought' and its significance for the traditional logical and psychological research]. *Doklady Akademii Pedagogicheskih Nauk RSFSR,* (1960), paras. 2 and 4.

[49] Sadovskij, V. N.: The Deductive Method as a Problem of the Logic of Science. In: Tavanec, P. V. (ed.): *Problems of the Logic of Scientific Knowledge.* Dordrecht, 1970, 160–211 and 168.

[50] Sadovskij: *op. cit.* 173 and 187.

[51] Klaus, G.: *Einführung in die formale Logik.* Berlin, 1959. 290.

[52] The replacement of the category *Urteil* ['judgement'] by 'theses' and the use of 'validity' instead of *Wahrheit* ['truth']. For the intense debates they have otherwise rightly provoked, cf. Peczenik, A.: Doctrinal Study of Law and Science. *Österreichische Zeitschrift für öffentliches Recht,* 17 (1967) 1–2, 129–131 and 134–135; Opałek, K.: The Problem of Validity of Law. *Archivum Juridicum Cracoviense,* 3 (1970) 7–18; and as to the analogy between 'validity' and 'truth', Wright, G. H.: *Norm and Action.* A Logical Enquiry, London, 1963, 196–197.

theses of *S* are valid; (c) providing that certain theses belong to *S*, every further thesis inferable from these according to the rules of logic has to belong to *S*; (d) there has to be a finite number of concepts in *S* whose meaning needs no explication, and the meaning of all other concepts belonging to *S* has to be definable by that finite number of concepts; (e) there has to be a finite number of theses in *S* whose validity is evident, and all the further theses of *S* are inferable from that finite number of propositions according to the rules of logic."

The condition (a) refers to the unity of legal regulation in a wider sense. Condition (b), a *sine qua non* one for descriptive propositions stipulating that "all judgements of *S* are true judgements", is tautologic in law as accepted *per definitionem* from the very start. Condition (c) formulates a necessary presupposition for any logical treatment of law, postulating in doctrine [*Rechtsdogmatik*][53] that both the posited norms and their logical consequences are to be taken as propositions of the law at the same level and to the same effect.[54]

As to condition (d), the first specific requirement for the law's axiomatisation, we are now to encounter rather difficult dilemmas. In the first moment, however, a compromise solution may seem to offer itself. For instance, we could presume that both posited law and its doctrinal study (engaged in the law's linguistico-logical processing into a semantically higher-level meta-system), together with the set of principles asserted in standing jurisprudence and its underlying professional ideology, are to embody those principles of interpretation through which the meaning of the law's fundamental concepts can be established as evident, and the meaning of all the further concepts as validly accepted.[55] However, the neuralgic point is not here but on deductive sequence, on the inferability of concepts allegedly derived from some fundamental concepts in the given axiomatic system.

[53] Cf. by the author: Law and its Doctrinal Study (On Legal Dogmatics). *Acta Juridica Hungarica*, 49 (2008) 3, 253–274.

[54] E.g., Wróblewski, J.: *Zagadenienia teorii vykladni prawa ludowego*. Warszawa, 1959, 248 and 482, as well as Peczenik: *op. cit.* 131–134.

[55] A similar approach is suggested by Wróblewski *Zagadenienia teorii...*, passim; Ross, A: *On Law and Justice*. London, 1958, 138–139; and Jørgensen, S.: Argumentation and Decision. In: *Festkrift til professor dr. jur. et phil. Alf Ross*. København, 1969. as well. In fact, all such approaches share the conviction that meaning in law is a function of contexture and that the law's social context of interpretation is part of that contexture. Cf., by the author: On the Socially Determined Nature of Legal Reasoning. *Logique et Analyse* 16 (1973), Nos. 61–62 and in: Perelman, C. (ed.): *Études de logique juridique* V. Bruxelles, 1973, 21–78.

If this is so, then *law is unsuited to axiomatisation* by virtue of the very nature of its concepts, considering the fact that in any system-constructing quality the very sinse of *deductivity* is *alien* to them. Or, the basic condition of the law's axiomatisability remains unfulfilled already at a conceptual level. For no law has fundamental concepts with meanings evident in themselves; no principles of interpretation are exhaustively defined by or construable from the system; moreover, the law's concepts are not necessarily inferable from within the system.

Finally, condition (e), specific to law, raises drawbacks even more insurmountable.

(1) A preliminary remark has firstly to be made. Condition (b) stipulates that "all theses of *S* are valid" and condition (e) stipulates that "there has to be a finite number of theses in *S* whose validity is evident". Accordingly, we have already stated that all the law's components have to be held valid, as the amalgamate of valid and invalid elements in law is *per definitionem* excluded. Indeed, a number of interpretive principles, enacted rules as well as professional maxims have for long been developed to deprive propositions with no validity within or incompatible with the system of their belonging to that system.[56] Nevertheless, law is a specific continuum in the unbroken process of norms gaining and losing validity, a continuum with boundaries constantly forming in time.[57] (As it can be noticed, we are focussing here on the formal–positivistic–aspect of the very complex notion of validity.[58] Although this fits in better with the specific direction our investigation is taking, the sociological approach to the notion of validity would cause no change in accepting validity as a prime criterion.[59])

All that notwithstanding, the category *of truth* (expressing correspondence between reality and its cognition in epistemology) and the one of *validity* (designating the legally normative quality of the regulation) do not have the same position when complying with the above conditions. For in case of descriptive propositions, there is a close and somewhat intimate relationship between the truth and the evidence of truth, an organic coupling which is quite alien to norm-propositions. The evidence of truth is revelative of contents and of the quality how they are reflected. The evidence of validity tells only about

[56] See, e.g., Wróblewski *Zagadenienia teorii...*, *op. cit.* 282 adn 481.

[57] Cf., by the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999, particularly at para. 6.1. on 203 et seq.

[58] Cf., by the author: Validity. *Acta Juridica Hungarica*, 41 (2000) 3–4, 155–166.

[59] Cf., by the author: Quelques questions ..., passim, especially at 601.

the respective norm's belonging to–by sharing in–the law's overall normativity.[60] In contrast to the evidence of validity, the evidence of truth cannot be self-explanatory or tautologic. In his *Philosophical Notebooks*, also *Lenin* identified the source of axiomatic evidence in the justificatory power of the continuity of man's practical activity,[61] concluding therefrom that axioms "are not true because they are evident, but they are evident because they are true".[62] No "transcript" in law of such an allegation–claiming that "norms are not valid because they are obvious but they are obvious because they are valid"–could lead to any plausible result. The norm acquires normative form by gaining normative expression in order to become separated from both epistemological truth and ontological necessity, in a way of being also freed of disputability any longer. This refers to the very fact that validity (like any other element of norm systems) appears as "an artificial human construction",[63] a result of man's social activity. Simultaneously, it gets applied as a criterion set vis-a-vis norm systems as a *sine qua non* of the legal qualification of reality. Otherwise speaking, it has a constructive role in the specific establishment of the law's quality as "distinctively legal".

(2) Our genuine problem relate only to the second phrase of condition (e), implying the cardinal query for the *sine qua non* condition of selecting axioms from theses of the system, in order to construct it deductively this way.

Namely, law can be conceived as an axiomatic system in two ways.

According to alternative (A), the total sum of the laws' posited provisions shall be taken simply as a set of axioms. Then the posited body of the law with all its logical consequences will stuff the axiomatic system as a series of axioms, and the theses elaborated by the law's doctrinal study, concluded deductively therefrom, as theorems. According to alternative (B), distinction is

[60] Of course, the kind of validity referred to here accords with its *positivistic* understanding. Validity in a positivistic sense is indifferent to contents, so it carries the law's specificity–the "distinctively legal" quality–in a most pure form. Its *sociologistic* sense (which instead of signalling mere belonging–or ascription–to the system, describes actual functioning) remains a formal category on the whole. It asserts the normative quality of norm-propositions belonging to the legal system through their being asserted by (and in) judicial acts and other sociologically significant events. Besides these two senses, one may specify its *contentual* understanding as a further notion of validity. This relates to the value of norm-propositions some instrumental value (functionality, suitability, desirability, abstract acceptability, and so on), in view of the law's purposes accepted in a given circle.

[61] <http://www.marxists.org/archive/lenin/works/cw/volume38.htm>.

[62] Quoted by Klaus: *op. cit.* 291.

[63] *Ibid.* 72.

to be made between provisions that provide fundamental regulation and ones only executing the former as subordinate to it. Either solution can only be accepted as failing presupposition.

(Ad A) The first alternative of axiomatic system-construction is redundant as it can only offer a pseudo-solution. The qualification of the total sum of enacted provisions as axioms would deprive this artificial system exactly of its specific–axiomatic–character, for the selection of axioms would exclusively be directed by a wholly external factor, namely, by the act of the legislator having posited those provisions. In case if axiomatic quality is not defined by the suitability of the proposition in question to serve as a foundational stone for system construction, we may scarcely speak of an axiomatic system.[64]

Ad B) By selecting axioms, the other alternative, too, is to bring artificial division in the system, as it will distinguish between axioms and normatively posited and not posited propositions as logically inferable theorems.

In order to overcome artificiality, we could state that as regards the validity of *contents*, both normatively posited and not posited propositions, once logically inferable, are equivalent. Nevertheless, a division as outlined above could not be without problems. Partly because it is likely that we should select our axioms by far not exclusively from among the law's hierarchically upgraded provisions (from a Basic Law or a code's General Part with fundamental principles of the regulation). By this, we would unavoidably contradict the very spirit of the structured law and the normative significance attributed to it. And partly because there is high probability for axioms getting selected not only from the law's normatively posited stuff but of creating some of them, through mental (re)construction, as logical premise to some normatively posited provisions. Accordingly, our system would be constructed as an artificial set of four components, namely, normatively (1) posited and (2) not posited axioms and their normatively (3) posited and (4) not posited logical consequences, taken as theorems.[65]

[64] Opałek, K.–Wolenski, J.: *Das Problem der Axiomatisierung des Rechts.* Later in: Winkler, G. (ed.): *Rechtstheorie und Rechtsinformatik.* Wien–New York, 1975. 51–66, also foresaw such a solution (on 15–16) by accepting its set as a class of *independent* norms (axioms). Without objecting to or refuting it, they concluded that it cannot be but of a "minimum value" in practice.

[65] Opałek & Wolenski, 16 also find this option feasible for a procedure when, first, axioms are inductively formulated from the posited stuff of norms, and then, the system's theorems are deduced from them. The criticism the authors exert seems however to focuss on a secondary point. The issue of deducibility being left untouched, they are only

One of the prerequisites of axiomatisation according to condition (d) has been a network of concepts constituting the system that can be arranged in a deductive order. However, as we have seen, concepts of law are not of such a type. In law, as known, it is by far not only concepts that resist getting transformed into a deductive chain of consequences. For propositions defining the mutual relationships and connections amongst concepts withstand deductivity, too, by virtue of their nature shared with one of concepts. Posited law is scarcely stuffed with norms deducible from the law's other norms in a formal, strictly deductive way.[66] Propositions fundamental to delineate the contents of legal systems mostly appear as delimitations–actualisations and concretisations–of purposes set forth by high-level politico-legal documents, the normative regulation of which will mostly provide the definition of those instrumental behaviours which have been selected by the legislator to achieve the desired aims. This is the reason why both the basic arrangement and its regulation in details–often distinguishable through a thorough analysis of contexture exclusively–are provided by the legislator and in a normative way.[67] Whereas, if we were indeed in a position to rely on deductivity, the legislator could safely leave the job of deducing systemic theorems from given axioms to either the professionals of doctrine or the law-applier.

Or, as expounded elsewhere,[68] processes of law-application cannot be reduced to deductive operations. Accordingly, attempts throughout history at eliminating *par excellence* creative moments from judicial processes were always bound to failure.[69] Neither doctrinal study can be based upon mere deductivity.[70] In the law's proper domain, be it either made or applied, instead

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preoccupied with the consequence that such an implementation will inevitably exceed the boundaries of the underlying system and result in a "substantial overextension", unacceptable for a *Rechtsdogmatik*.

[66] Wróblewski: Axiomatization..., *op. cit.* especially at 380–381. The structure of legal systems is described as a complex–at the same time dynamic and static–entity in his System of Norms and Legal System. *Rivista internazionale di filosofia del diritto*, 49 (1972) 2, 224–245, especially on 228–229 and 236.

[67] Cf., by the author: Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context. *Acta Juridica Hungarica*, 43 (2002) 3–4, 219–232.

[68] Cf. Varga: On the Socially Determined..., *op. cit.* passim.

[69] Cf., by the author: A törvényhozó közbenső döntése és a hézagproblematika megoldása a francia jogfejlődés tükrében [The interim decision by the legislator as a way of filling gaps, as overviewed through the French legal development]. *Jogtudományi Közlöny*, 26 (1971) 1, 42–45.

[70] E.g., Peczenik: Doctrinal Study of Law..., *op. cit.* 135–138.

of purely formal logical connections there are only interrelations of contents, which delimit the field of formal deductivity to a sheer hyperbolic ideal.

(Lack of Deductivity in the Law's Deep Structure) The very nucleus of any axiomatic system is that in some set of building blocks there are few foundation stones from which one given building can be built up in one given form with the necessity that the operation, in view of the result, can be repeated by any actor at any future time. However, the relationship amongst the constituents of legal systems is not such as to allow to make up their edifice in exclusively one form, if its axiomatic procedure is defined and some constituents as foundation stones are designated. The principle of deductivity is at the heart of all axiomatism. The eventual lack of the deductivity of legal concepts affects directly the alternative (B) only. The alternative (A) seems not to be excluded as a job to be undertaken. Or, this alternative could be realised without, however, bringing us closer to the gist of legal axiomatism. Its acceptance would be like claiming to explain the structure of a building by defining its construction procedure and one or two foundation stones assigned to it, but presenting in fact the whole edifice with each and every (different) piece of stone built in as foundation stones, and with each and every concrete (different) manner of their building in as fundamental procedures.

2. *The Heuristic Value of an Ideal*

(Cases of N/A) As the basic characteristics of axiomatic systems are not applicable to law, we have to regard legal systems as *non-axiomatic and not axiomatisable* ones.

As to the further, accessory properties of axiomatic systems, neither the principle of the *independence of axioms*[71] nor the one of *irreducibility*[72] is applicable in law. For providing that we accept all the normatively posited provisions of the system as axioms (proposal (A)), we exclude the above principles from the outset. Providing that we accept exclusively the system's elaborated basic principles as axioms (proposal (B)), we do presume those principles already fulfilled from the very beginning.

[71] According to which none of the axoms can be deduced from any other, serving as the latter's theorem. Klaus: *op. cit.* 303.

[72] Fulfilled as an improved version of the former, "if each axiom of the system is independent of the conjunction of the other axioms", that is, "if both this very axiom and its logical negation are logically compatible with the conjunctions of the others". Klaus: *op. cit.* 321.

One of the advantages of axiomatic system construction is that by revealing the identical structure of seemingly differing theoretical and practical systems, it allows them to be analysed collectively and synthesisingly.[73] This collectivity is introduced by the term of *isomorphy* in logic. Namely, "[i]f the models differ only in the different character of the specific interpretations regarding their components, and if they coincide totally when we disregard this for the sake of their treatment on a formal axiomatic plane, we say that the models in question are of an isomorphous character as they have quite identical a logical structure".[74]

Well, in the domain of law, if we cannot speak of isomorphy among systems, the question itself becomes pointless. Although quite a few isomorphous structures can certainly be encountered among various institutions within given legal systems, their examination points beyond axiomatics. Consequently, also *dependence*–namely, "if the system itself or its logical negation can be inferred from the other"–is quite alien to legal systems, thus–apart from some exceptions in the domain of the techniques of legislation[75]–we may conclude that any legal system is "logically incidental" compared to other systems.[76]

(Cases of Correlation) However, it does not result from the law's inherently non-axiomatic composition that legal systems could not carry features interpretable within an axiomatic perspective.[77] Even the law's geometric ideal can only gain a meaning in history if the law has a genuine façade suitable to be

[73] Cf., e.g., Blanché: *L'axiomatique...*, *op. cit.* ch. IV, § 23. *Lukács* too, albeit opposed (as flatly hostile) to any formalism in general, welcomed the tendency towards "the mathematisation of all sciences". Lukács, Gy.: *A különösség mint esztétikai kategória* [Particularity as an aesthetical category]. Budapest, 1957, 149–150.

[74] Blanché: *op. cit.* 46.

[75] Obviously, there is isomorphy in the exceptional cases of promulgating the same statutory texture in separate jurisdictions. Yet this is irrelevant for logic. Reception of legal texts can become relevant for isomorphy only provided that either the same basic principles are broken down differently in detailed regulations or differing basic principles will be asserted in the same texture of regulation. Properly speaking, this is not the issue of isomorphy to be at stake. Isomorphy is related to the identical structure of systems differently interpreted, while reception with variations testifies only to the dialectics inherent in the demand for harmony between basic principles and their detailed breaking down in a regulatory concretisation.

[76] Klaus: *op. cit.* 321.

[77] E.g. Savigny, E.: Zur Rolle der deduktivaxiomatischen Methode in der Rechtswissenschaft. In: Jahr, G.–Maihofer, W. (ed.): *Rechtstheorie.* Beiträge zur Grundlagendiskussion. Frankfurt am Main, 1971, 315–351 and Rödig, J.: Axomatisierbarkeit juristischer Systeme. In: Rödig, J.: *Schriften zur juristischen Logik.* Berlin, 1980, 65–90.

brought into connection with the characteristics of axiomatism in some way. Or, our basic rejection will reckon with moments suggesting a certain connection notwithstanding.

Although, according to the general theory of science, "[t]here is something asserting itself as a rule in the development of sciences, driving them in an irreversible sequence in function of their place in the hierarchy along four subsequent phases, that is, the descriptive, the inductive, the deductive, and, finally, the axiomatic ones",[78] yet we may agree with *Klaus* that "there is no science which could exclusively be axiomatic-deductive".[79] For not even the focus of axiomatisation on formal definition can exclude that–methodologically speaking–axiomatics will be acknowledged as the endpoint of all processes arising from the analysis of any concrete totality of material or intellectual phenomena. "It may occur only in books that axiomatics begins with axioms, for with the axiomatician it is just the axioms where it ends. Namely, axiomatics presupposes substantive deduction to which it gives a shape, which requires lengthy inductive preliminary work in collecting the materials to be organised this way. On such a basis, the axiomatician's genuine job will be to identify axioms, that is, instead of drawing mere consequences from given principles, he will have, once a set of propositions is given, to find the minimum system of those principles from which the propositions in question can be deduced."[80] This is but a concretisation in logic, the epistemological formulation of which was already provided by *Engels* in his crude polemics with *Dühring:* "The general results of the investigation of the world will only be obtained when the investigation is already over: these are *results* in accomplishment rather than *basic principles* to start on. To construct the former mentally through concluding from the latter as reliable basis in order to reconstruct the world is sheer ideology".[81]

Or, axiomatic system building is by far not simply a game with signs for themselves, a futile exercise in some vacuum, but a way of systematising knowledge itself. Accordingly, its pattern may become an instrument of the

[78] Blanché: *L'axiomatique... op. cit.* 84.

[79] Klaus: *op. cit.* 325.

[80] Blanché: *op. cit.* 87.

[81] Engels, F.: *Anti-Dühring.* In: Marx, K.–Engels, F.: *Werke,* 20. Berlin, 1987, 574. Or, formulated elsewhere in the same developments, "the principles are not the starting-point of the investigation, but its final result; they are not applied to nature and human history, but abstracted from them". <http://www.marxists.org/archive/marx/works/download/Engels_Anti_Duhring.pdf>.

theoretical appropriation of the world, albeit its suitability is by far not unlimited. Moreover, if we stated beforehand that there is no system exclusively axiomatic, now we may risk the opposite-direction statement, namely that there is no system with absolutely no features of axiomatism. *For absolute axiomatism* is an empty category so much as *absolutely no axiomatism* is.

The two pillars of axiomatic system building is *formal construction* and its *deductive definition*. These are basically not proper to law, yet they may have some aspects within the perspective of which they may become methodologically significant for it. For instance, the very fact that "in the axioms of the *Euclidean* geometry, all propositions of this geometry are in principle involved,"[82] is characteristic of all axiomatic systems. Among norm systems, there are in principle–as theoretical models–so-called static systems, in which the basic norm of validity elevates–by delineating the system's contentual boundaries as a general condition of validity, and with the rules of inference given–the whole system to be a logical consequence of the basic norm.[83] No need to say that such systems are scarcely set up anywhere in practice. Yet in law, norms authorising the issuance of, or extending validity to, certain subordinate norms may be defined in a way that the conformity (e.g., constitutionality) of the latter to this hierarchically higher level can be adjudicated, for instance, on the basis of the particular deducible from the general, or of its lack of contradictions, or of its recognition as embodying an instrumental value. On the other hand, there are general principles in law-codes, which may matter especially when treated quasi-axiomatically in the delimitation of the generalisable features of the details of the regulatory arrangement, as well as when decision is to be made in atypical or borderline cases, or when just filling gaps in the law are at stake. Or, the contentual superiority of general principles in so-called code systems[84] does by far not amount to their suitability to be taken as axioms in the sense of entailing all the code's propositions on principle. For general principles as the system's basic propositions may, by formulating the objectives and the overall ethos of the entire regulation, greatly delimit the circle of instrumental behaviours to be specified and legally qualified by the said regulation, without, however, defining them, as there is

[82] Klaus: *op. cit.* 319.

[83] Cf. Wróblewski: System of Norms ..., *op. cit.* 226–227.

[84] Cf. Szabó, I.: Régi és új kérdések a szocialista jogelméletben [Old and new questions in socialist legal theory]. In his *Szocialista jogelmélet–népi demokratikus jog* [Socialist legal theory–people's democratic law]. Budapest, 1967, 119–120; and also Wróblewski, J.: The General Principles of Law. In: *Rapports polonais présentés au sixième Congrès international de Droit compare.* Varsovie, 1962, 220–222.

no exclusive, categorical equivalence between the objective set and the way the law may intend to reach it.[85]

What is therefore proper to legal systems–instead of formal derivation and consequence–is but a *mutual contentual relationship*, within which eventual contradictions or disconformities between principles and actual realisations can quite well be detected, but not in a way to be substituted by relations of mutual definition and inferability.

Finally, two further basic characteristics should as well be mentioned, ones that are requirements formulated in axiomatic systems as attached directly to their systemic character (rather than to their deductivity) and thus are asserted in law far more directly. The "requirements of deductive systems have different theoretical-cognitive 'force'"–according to science theory. "The most important of them is the requirement of *consistency* since otherwise the system is ruined. The other requirements have less importance."[86] Well, this requirement can be formulated easily. An axiomatic system is consistent if it "does not contain two statements, one of which is the negation of the other." Or, in other words, if "of any two contradictory sentences at least one cannot be proved."[87] If, therefore, consistency means that "it is not possible to prove from the given axioms both a certain formula X and the logical contradiction to X",[88] then, in the domain of law, this will correspond to the requirement that, within the system, any behaviour can be qualified either as X or as *non-X*. That is, the same behaviour cannot be regarded as lawful and unlawful by the same system at the same time. Or, *freedom from contradictions* is of an extraordinary significance in and for law. In the technological elaboration of its store of instruments, this is one of the primary conditions of the law's internal "morality", that is, of its efficient socio-political functioning.[89] Simultaneously, this is also a presumed and necessarily postulated element of the legislator's rationality

[85] Cf., by the author: The Preamble: A Question of Jurisprudence. *Acta Juridica Academiae Scientiarum Hungaricae*, 12 (1971) 1–2, 101–128.

[86] Sadovskij: *op. cit.* 202.

[87] Sadovskij: *op. cit.* 200 and Tarski, A.: *Introduction to Logic and to the Methodology of Deductive Sciences.* 2nd American ed., New York, 1994, 125.

[88] Klaus: *op. cit.* 300.

[89] The freedom of contradictions was defined as the basic feature of law (which has to be "an expression coherent in itself") by *Engels*, and as one of the preconditions of the law's "*inner morality*", by Fuller, L. L.: *The Morality of Law.* New Haven–London, 1965, 65–70. For the latter, cf., by the author: Reflections on Law and on its Inner Morality. *Rivista Internazionale di Filosofia del Diritto*, 62 (1985) 3, 439–451 and The Inner Morality of Law. *Acta Juridica Academiae Scientiarum Hungaricae*, 29 (1987) 1–2, 240–245.

that allows and also necessitates kinds of interpretation which can prevent any contradiction that there may still be.[90]

In connection with consistency, the feature of *categoricity* as a specifically formulated prerequisite for freedom from contradictions has also to be mentioned. As known, in the mid-19th century, *János Bolyai* and *Nicolai Ivanovich Lobatchevsky* proved on *Euclid*ean geometry, the very first system of axioms ever elaborated in scientific development, that all its abstract perfection notwithstanding, it is not the exclusively feasible system of geometry, for when the system gets reorganised by changing its axiom(s) of, e.g., parallelism, the result can again be a system freed from contradictions which, among its boundaries, provides a complete answer to all questions that can at all be raised within the said system of geometry. Accordingly, we can state that a system "is not categorical, if a thesis *p* and also its logical negation can be proposed in an axiomatic system".[91] Well, while–as we have seen–in axiomatics it might have been conspicuous that *Euclid*'s geometry was proved not to be categorical for, e.g., parallelism, categoricity in and for law may turn out to be of interest first of all in a positive sense. Namely, in law there are so-called *basic principles*, mostly particular to given types of legal arrangements.[92] And this may lead us to the tentative conclusion that, on the last analysis, the legal system is a function of various "basic principles" taken as general theses, characterised by categoricity. However, legal systems are neither static, nor rigidified, and we know from legal sociology how contradictory tendencies law may incorporate and what tensions it may endure until a new start (e.g., by a revolution) brings a break into the system's development.[93] Or, the flexibility of legal systems is also a function of their categoricity to a considerable extent.

Along with consistency, another basic feature of axiomatic systems is the requirement of *completeness*. "A formal system is semantically complete in the absolute sense if every sentence, having value in reference to any model of this system, is inferable in it." That is, if "every sentence which is formulated by

[90] Cf. Nowak, L.: *Próba metodologicznej charakterystyki prawoznawstwa* [Essay on the methodological characteristics of legal knowledge]. Poznan, 1968, 199–200.

[91] Klaus: *op. cit.* 322.

[92] For the socio-political bounds of–especially socialist–basic principles, see, by Szabó, I.: *A szocialista jog* [Socialist law]. Budapest, 1963, 454 and 72–79 and Régi és új kérdések... [Old and new questions...]. *op. cit.* 122–124. For some principles universalised and thereby also self-emptying, see Péteri, Z.: The Nature of the General Principles of Law. In: Szabó, I. (ed.): *Studies in Jurisprudence for the Sixth International Congress of Comparative Law*. Budapest, 1962, 43–59.

[93] Cf., e.g., Lévy-Bruhl, H.: Tensions et conflits au sein d'un même système juridique. *Cahiers internationaux de Sociologie*, 30 (1961), 35–46.

employing the terms of this theory can be proved or disproved within it."[94] Searching for the equivalent of axiomatic completeness in law, we can formulate that a legal system is complete if the qualification of any behaviour covered by the regulation of the given system can be deductively inferred from its propositions. The opposite of completeness is obviously incompleteness, the case of which can be established depending on how we define the system's boundaries to which it is related. Usual definitions relate it to theses either drawn "from the system's area" or "correctly formulated in terms of the system".[95] This way, applying axiomatism to law, we are to see that such a logical approach corresponds to the positivistic understanding of gaps in law: both define the system's boundaries from inside, by the system's own terms. Opposed to it, a sociological approach may result in a "more complete" concept of completeness, as it draws its boundaries from outside, by assessing the widely felt demands of social reality.[96]

3. Conclusion: Ideals and the Dialectics of Substantivity

With the present investigations concluded, it seems that the creed of David *Hilbert*, one of perhaps the greatest representatives of modern mathematics–according to which "I believe that all that can at all be an object of scholarly thought is, by achieving its maturity for theory-building, suitable for axiomatic elaboration and thereby also for mathematisation."[97]–is based on an unproved and unprovable generalisation. Albeit it is true in a figurative sense that "the block is not on the mason's side, but against him, and the first thing that happens in its shaping seems the most unnatural of all",[98] yet it is not merely the inertia of the material concerned I mean by referring to law. For legal systems are truly dynamic systems thoroughly built on substantive interconnections. Therefore they resist axiomatisation.[99] At the same time, the *substantivity of inherently dialectic interrelations* may not prevent theoretical reconstruction from treating legal systems in their *sui generis* type of intellectual representa-

[94] Sadovskij: *op. cit.* 202 and Tarski : *op. cit.* 135.

[95] Klaus: *op. cit.* 321–322.

[96] For the dichotomic approach of gaps in law and their feasible synthesis, see, by the author: Quelques questions méthodologiques..., *op. cit.* 205–241.

[97] Hilbert, D.: Axiomatisches Denken. *Mathematische Annalen*, 78 (1918), 415.

[98] Mann, T.: *The Tables of the Law.* [Das Gesetz, 1944] New York, 1945, section 15, 36.

[99] Peczenik, A.: Jumps and Logic in the Law: What can one Expect from Logical Models of Legal Argumentation? *Artificial Intelligence and Law*, 4 (1996) 3–4, 297–329 will abstract his final message as follows: "A strict and formal logical analysis cannot give us the full grasp of legal rationality."

tions within which "the Parts altogether define the Whole by defining each other mutually". For such a system–as the arguments holds on[100]–may prove to be "not only an organised but an organising unit to finally organise itself into one single entity with Parts organised by the Whole and the Whole prevailing through the Parts organised".[101]

[100] Bartók: *op. cit.* 19.

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Confrontation from a Criminal Procedural Approach

Abstract. The author made a research over the past six years, and gathered data regarding confrontation as truth-seeking method in the criminal procedure. He analysed the Hungarian legal rules of confrontation in historical and recent time and claimed that the concept and the types (classification) of confrontation was clear. As an evidentiary procedure, it can be well demarcated and distinguished from other applicable means of seeking the truth in CPA and beyond it in the area of criminal-tactics. Thus, from interrogation, identification parade, attempt to prove, crime scene interrogation, search/body search, parallel hearing of experts, polygraph and cross-examination. Above all you can read a few amendment proposals of the statutory regulation of confrontation.

Keywords: compulsory confrontation, crime-solving tactics, criminal investigation, cross-examination, excluded evidence, face to face, identification parade, interrogation, legal remedy, participatory rights, statutory regulation

1. The concept of confrontation

It has become clear from my research with a historical perspective that it was not confrontation but rather torture that was used as a regulated method of seeking the truth in the ancient times or at the beginning of the feudal Middle Ages. Torture began to get 'loosened' in the late Middle Ages, in the 17th and 18th centuries, when the institution of confrontation came into existence. Torture was officially abolished in the 19th century after a temporary duality i.e. coexistence and was replaced solely by confrontation sometimes together with an oath on the basis of an accusatorial attitude.

Confrontation–with a stress on the trial stage–had a detailed legal regulation as early as the first part of the 20th century in some codes of criminal procedure including the Hungarian one. However, these rules still lack the definition of confrontation leaving this task to scholarly jurists. Thus, the notional definition and the description of the essential features of confrontation are indispensable.

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Before providing the definition, it should be noted that my legal historical research has made it clear that in the beginning, in the 17th and 18th centuries and even in the 19th century confrontation was also called 'counter-front-statement', 'face to face testifying', and counter positioning. This latter one indicates that the persons confronted stood facing each other. The collation of testimonies was sometimes performed–virtually–by reading, which means statements were not actually said to somebody's face.

The modern theoretical grounding and the practice based on it is different. Special literature seems to be of a unified standpoint claiming that "the essence of confrontation is a special, 'combined' interrogation, an independent investigatory (procedural) act in the framework of which more than one person is interrogated concurrently in order to resolve any marked contradictions between testimonies made earlier by the interrogatees."[1]

The definition I also agree with needs to be made more precise by stating that the term 'more than one person' can only mean definitely two persons, not more and not less. If there were only one person, it would fall into the category of general interrogation and there could obviously be no confrontation; if there were more than two, the psychological and criminal-tactical reason for its existence would be called into question.

2. The statutory regulation of confrontation

Pursuant to the effective though fairly brief Section 124 of Act XIX of 1998 (CPA):

> *"(1) If the testimonies made by the suspects and the witnesses or the suspect and the witness contradict, such contradiction may be clarified by confron-*

[1] Tremmel, F.–Fenyvesi, Cs.–Herke, Cs.: *Kriminalisztika Tankönyv és Atlasz* [Textbook and Atlas on Criminalistics]. Budapest–Pécs, 2005. 385.

A similar definition can be found in the German literature. "Confrontation, which serves the purpose of eliminating contradictions, is the simultaneous interrogation of the persons who have already been interrogated and whose statements markedly differ from each other." Ackermann, R.–Clages, H.–Roll, H.: *Handbuch der Kriminalistik.* Stuttgart–München–Hannover–Berlin–Weimar–Dresden, 1997.

According to the French special dictionary of criminal law, confrontation is "the counter-posing of witnesses, a witness and the victim, or a witness and the suspect. Thus their allegations may be checked, collated and measured in the presence of each other." *Dictionaire de droit criminel.* Paris, 1992.

tation if necessary. The persons confronted shall make their testimonies in words to each other; they may put questions to each other.

(2) The confrontation of the witness and the suspect shall be omitted if it is necessitated by the protection of the witness or the suspect.

(3) A person not having attained the age of fourteen may be confronted provided it arouses no fear in the minor."

The statutory regulation may be analysed by the help of the main questions (guidelines) of criminalistics. These are: What? Where? When? How? Who? With Whom? Why?

What is confrontation? It has already been dealt with in the part giving the definition of this concept, here it is only added that it is a method of seeking the truth expressly not specified or defined by law. It is referred to as an 'evidentiary procedure' in CPA, which can be challenged from a terminological point of view, since evidencing is the alpha and omega of the whole criminal procedure, there is hardly such a thing as a procedure within a procedure, it is extremely misplaced, it bears unnecessary duplication.

It is, however, praiseworthy that now it is unfolded from the gown of interrogation (of 1973) and now it is given a separate section emphasizing its special nature and existence on its own.

Where can it be applied? This question should be rephrased as, *Which authority shall apply it under which section of CPA?*

Possible stages and actors are: investigatory-police (other investigatory organs such as customs investigators are not described here), interim-prosecution, and trial-judiciary.

The issue may be examined from several aspects. On the one hand:

a) What was the intention of the law-maker?

b) What is the opinion of law enforcement and administration?

c) What is the real situation?

d) What is the author's position in this respect?

Ad a) The legislator would have liked to shift the emphasis to the trial-judiciary stage in the framework of the reform of criminal procedure initiated in the early 1990s. It was indicated by the fact that according to the legislator, the main aim of the investigation was to inform the prosecutor and the principles characterising the whole procedure could get unfolded in full in the trial stage in an independent and impartial court. Consequently, confrontation as the application of a truth seeking method was considered appropriate rather in the trial-judicial stage partly returning to the model of the CPA of 1896. This may be the reason for the polished amendments of the wording of the act

such as the inclusion of the word 'may' instead of 'shall' in the scope of application and the protection of witnesses/suspects and children, which may be implemented more easily before the courts than before the investigatory authorities.

Ad b) The opinion of law enforcement and administration, judges, prosecutors, (defending) counsels and police persons (and suspects) is well reflected in the finding of my empirical study:

On the average, half of law enforcers and administrators are satisfied with the current legal regulation of confrontation with prosecutors standing out of this circle. Four fifths of them regard it appropriate as opposed to the suspects, of whom only one fifth approve it. The rate of satisfaction is similar in the case of the investigatory implementation (48%), while the method of implementing it in the trial-judicial stage is ranked at a higher quality level (67%). In accordance with it, only one third of the informants would place confrontation in the investigatory stage, however, the size of the group preferring the trial stage and the size of the group preferring both stages are approximately the same.

In other words, no marked dominance has been established by law enforcement and administration concerning the question "where shall we apply confrontation?"

Ad c) In reality–as supported by the part of the empirical research processing files and by the author's own practice–confrontations on the merit are carried out mainly in the investigatory stage, they are performed in the trial-judicial stage in a far smaller number and these tend to be formal and unsuccessful due to the lack of tension described in the theoretical grounding.

Ad d) Fully agreeing with the theoretical shift of emphsis and the increase in the importance of the trial-judicial stage related to the reform of CPA, I suggest that confrontation–considering mainly its psychological and criminal-tactical aspects–cannot be preferred and actually applied in the trial-judicial stage but rather in the investigatory-fact-finding stage. My argumentation is supported not only by the indicators of practical efficiency–which are better in the investigatory stage–but also the psychological factors which may bring about the situation of distress on the side of the person making untrue statements. These psychological factors can hardly be created in huge, impersonal courtrooms where the trial with adverserial features is often held in front of the members of the press and the general public. There are a lot of things missing such as the intimacy of nearby bodies, the effect of surprise as everybody may be familiar with the documents of investigation and the former records of trials, the dawn-raid effect, the harshness of the initial experience and I could keep enumerating. All these negatives make the trial application of confrontation unreasonable and ungrounded; consequently, I prefer its investigatory implementation.

The issue of the interim procedure may arise where the prosecutor with the results of investigation might perform confrontation. In theory. But in theory only, because on the one hand investigation has been completed by then and the same concerns may arise as in the case of timeliness in the trial stage, in other words participants may have become familiar with everything at the accomplishement of the investigation. In theory there is the possibility of a successful confrontation conducted by the prosecutor in the interim procedure where suddenly a new source of evidence for example a new–truthful–witness (the victim or the suspect making changes) appears and it has the power of surprise in the course of confrontation. This is highly unlikely in reality and so is the possibility of a prosecutor noticing the omission of confrontation during investigation and then performing it himself. Although nothing excludes its performance, empirical data show that members of the prosecuting authority rather send the documents back to the investigating authority to perform the act(s) of confrontation.

Preparing the trial is also part of the interim stage but performing a confrontation in that stage is theoretically excluded since proving on the merits or an evidentiary procedure cannot be implemented there, it can only be implemented in the trial stage.

A further argument for performing confrontation in the course of investigation is that interrogation and confrontation have their own methods and descriptions which are taught at a professional level in substantial depth and number of hours only at the Police College in Hungary. Thus officials at the investigating authority may be assumed to have the greatest knowledge and competence in this respect.

When and why is confrontation to be applied?

The question does not refer to the issue of the relevant sections of CPA, now it should be rephrased as follows: *in what cases and/or why must/may confrontation be applied?*

The answer may come partly from procedure law and partly from criminalistics (more precisely from criminal-tactics). This study covers only the legal aspects; its criminal-tactics deserves a separate study.

It is clear from the wording of the act that if there is a 'contradiction' between testimonies, it "may be clarified if necessary." As lawyers say, each word is an 'action-handhold'. Each word has its own importance and each can be examined.[2]

[2] Mihály Tóth did so in two of his studies on the regulation laid down in the former Act on Criminal Procedure, Act I. of 1973, the wording of which differs from the now

First, the contradiction has to be interpreted as the following question immediately arises: *Does the legislator's intention concern all conflicts and contradictions?*

I do not think this to be the case either in respect of the legislator's intention or the conduct to follow. It would be more appropriate–in accordance with the opinions of authors dealing with this issue–to insert an adjective into the legal provision, namely the need for confrontation may arise in the case of an 'essential' contradiction. Seeming and trifling contradictions concerning details and minutiae are not worth 'shooting our bolt' at. I use this phrase deliberately as one of the factors in the background of unsuccessful confrontations is the huge amount of unnecessary, schematic, apathetic and characterless confrontations lacking atmosphere and concerning insignificant matters which may be regarded as a set of 'forced confrontations'. Concealed behind it–as the findings of empirical studies show–is the fear of the police for the prosecution regarding the omission of this procedural act as a reason for supplementary investigation ('throwing it back), on the basis of the prosecutors' requirements. This fear can only be eased by the high-level and professionally well established joint (police-prosecution) interpretation and application of the regulation pertaining to confrontation, and on the basis of the mutual responsibility of the two authorities.

Mihály Tóth has already specified the most frequent theoretical and practical cases of contradictions which I can neither add to nor delete from as there is no such need. In his opinion the most frequent contradictions are as follows:

„a) The contradiction is only a seeming one as the the persons interrogated have stated the same but expressed themselves in a different way.

b) The contradiction is a seeming one because the differing statements do not concern the same fact.

c) The contradiction concerns the same fact but it is not significant from the point of view of the instant case.

d) The elimination of an essential contradiction concerning the same fact is not necessary since evidence on the one side outweighs evidence on the other side.

e) The elimination of an essential contradiction concerning the same fact is a tactical mistake as its being insoluble is the evidence itself.

f) The elimination of an essential contradiction concerning the same fact is necessary but it can be eliminated by some simpler and more certain method than confrontation.

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effective act. His findings still apply today. In more detail see: Tóth, M.: A szembesítés béklyójában [In the shackles of confrontation]. *Jogtudományi Közlöny*, 39 (1984) 139. and Feloldható-e a béklyó? [Can shackles be unfastened?] *Jogtudományi Közlöny*, 39 (1984) 282.

g) The contradiction to be eliminated could only be eliminated by confrontation but no success can be expected from the confrontation."[3]

There even seems to be some contradiction and uncertainty in the wording of the act as if there is a contradiction, a confrontation should be performed, however, there is an immediate concession stating that all this shall apply only 'if necessary'.

Some further questions arise: *What does 'if necessary' mean? Who defines what necessity is?*

The latter can more easily be answered promptly, it is the master of the case, 'dominus litis', the prosecuter in charge of the investigation, however, he is rarely in a position close enough, in other words decision-making is vested in the law enforcement official of the police. In the course of a review by the prosecution, the prosecutor will order the 'necessary' confrontation if the feeling of lack arises. If the member of the investigating authority deliberately omitted confrontation, a conflict situation arises, as the police officer met the persons testifying in the course of the procedure and for some psychological or rational reason he deemed confrontation to be unnecessary, inappropriate, undesirable or even detrimental to the whole evidentiary procedure and to its final outcome. The prosecutor implementing the review has not seen anyone, has not perceived any sign of metacommunication or any real personality, only the wording of CPA is imperative to him. The conflict can only be resolved on a professional basis, namely the investigator should inform the prosecutor about the professional reasons and conciliation should be conducted if needed. According to my experience of practice, unfortunately, we can never reach the situation in which the decision on performing a confrontation could be made solely by the investigators operating at the level of the executive since then it might soon turn out that there is no need for any confrontations or at least only a few would be performed. Investigators would immediately move in the line of least resistance since they do not have a high opinion of this institution at present–as has been shown by empirical research. They would try to omit confrontation due to its circumstantiality (it is always difficult to ensure the presence of more than one person at the same time), formality and the lack of faith, and would try to save time and energy, which might quickly lead to the decline and death of the institution. One counterargument is that an investigator is always interested in finding the truth, and is always urged on with what is referred to by the term 'houndspirit' in American literature, and deploys all lawful means including confrontation as a possibility. The idea is quite likeable and works in especially important cases, nevertheless, in most of the cases there is no trace of such a spirit and it cannot be perceived according to the rule of big numbers.

[3] Tóth, M.: *A szembesítés béklyójában, op. cit.* 140.

The discretion of a well established decision is respected by the guiding decision of the Supreme Court declaring, "if in a criminal case initiated for kidnapping the confrontation between the accused and the victim was not performed in the course of the investigation due to the sense of fear of the victim–and at the time of the trial the victim's presence could not be ensured due to his or her staying at an unknown place–it cannot be regarded as a procedural infringement affecting the well-groundedness of the judgement, for the very reason that besides the victim's testimony, the court considered and assessed all other evidences and evidentiary tools supporting it."[4]

In the trial stage it is undoubtedly the independent judge (court) that orders a confrontation. Compared to the investigator, the judge is in an easy position because the contradicting parties concerned are present, 'ready at hand' in the courtroom thus the act can be performed quite easily in some moments without any special formal or written requirements.

Revisiting the first question, the 'necessary' cases may be interpreted from a positive (permissive) and negative (excluding) aspect. Some important permissive conditions are:

– there are essential contradictions between the testimonies;

– the act of the confrontation is likely to be successful, a result can reasonably be expected.

In my view, the necessity of a confrontation is excluded if:

– a child should be confronted with an adult;

– there is no real chance for the confrontation to be successful, it is reasonably assusmed that it will lead to no result and there are data supporting this;

– the protection of the witness or the suspect (e.g. a pentito) requires it (as specified in Section 124 (2) of CPA)

– in the interest of the investigation (its success);

– the suspect makes a (even advance) statement refusing to testify in confrontation.

Further reasons may be found in both categories but these are the most frequent ones both in practice and at a theoretical level about which a decision must be made by the investigator, the prosecutor in charge of the investigation in the first main stage of the criminal proceedings, and the judge (court) in the trial stage.

It may be clear from my enumeration that I cannot agree with the concession prescribed in Section 124 (3) of CPA, pursuant to which a child may also be confronted "provided it arouses no fear in the minor". Having regard to my studies, experiences, and the psychological factors, I claim it as a principle fact

[4] Court Decisions 1999/12, case no. 544. (Supreme Court Bf. III. 1284/1998.)

that confrontation arouses fear and tension in a child under 14. The wording of the act questions the psychological principle of confrontation since the core of the act of confrontation is the intensified creation of distress and tension. This applies to the atmosphere and the circumstances of its performance even if it is not the child that is regarded as the person making untrue statements. It is impossible for a child to be in peace and quiet in a situation involving the police-authorities, where even adults would be 'shaky on their legs' even if they have got nothing to do with the crime. This section is welcome to have been included in the effective CPA, but it may be regarded as a first step only and not as ideal. I would consider it ideal and propose it as de lege ferenda to expressly exclude the possibility of confronting a child in the act itself. In my opinion subsection (3) should read: *(3) A person not having attained the age of fourteen shall not be confronted.*

In this area my opinion dissents from the standpoint of Hungarian courts, which is in line with the act in force, and which considers the statutory (personal) guarantees sufficient for the protection of children as witnesses in the case of confrontation too. According to a guiding decision published in the Court Decisions: "In the course of interrogating children not having attained the age of 14 as witnesses, the investigating judge shall observe the special rules set forth in the act on procedure. These include that such witnesses need not be warned concerning the consequences of perjury, they may be confronted only if it does not arouse fear in them, and their caretaker or legal representative may be present during the act–and cannot be sent out either–even if later they might be interrogated as witnesses."

The reasoning contains that several provisions of CPA (the presence of a caretaker, a legal representative or perhaps an expert psychologist and interrogation by a closed-circuit telecommunication network) establish the possibility of mitigating the psychological and other harmful effects inherent in the interrogation of a child as a witness to the smallest extent possible and necessary thus preventing the possible damages caused to their personality development.[5]

My argumentation is supported by the relevant legal practice of the European Court of Human Rights, according to which the state of being free from fear cannot be ensured at a trial. It should be added that in an investigatory situation the negative effects would be magnified because client-publicity is limited, the room is much smaller, mysteriousness, etc.

The ECHR declared in its guiding decision that the British authorities violated the right to a fair hearing guaranteed in Article 6 § 1 when in the case of

[5] *Bírósági Határozatok* (Court Decisions), 53 (2005) 738, case No. 343.

an 11-year-old accused the trial took place over three weeks in public in the Crown Court. In its reasoning the Court noted, "the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain modifications to the court-room, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since they felt exposed to the scrutiny of the press and public. Both applicants suffered post-traumatic stress disorder, and had limited ability to instruct their lawyers and consult adequately the details of their acts. They found the trial depressing and frightening and were unable to follow it. In such circumstances the Court did not consider that it was sufficient for the purposes of Article 6 § 1 that the applicants were represented by skilled and experienced lawyers. Here, although the applicants' legal representatives were seated "within whispering distance", it was highly unlikely that the applicants would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given their immaturity and their disturbed emotional state, they would have been capable outside the courtroom of cooperating with their lawyers and giving them information for the purposes of their defence. In conclusion, the Court considered that the applicants were denied a fair hearing in breach of Article 6 § 1."[6]

Concerning necessity, the following question may be asked, *is there a compulsory confrontation?*

Is there a situation where the confrontation must be performed in any case?

The legal answer may be deduced from the act: no. The wording of the act contains two restrictions, necessity and possibility. In other words, it no longer uses the command 'shall' as it used to. I fully agree with it, all the more so as besides the legal arguments, there are the criminal-tactical arguments serving as confirmation which may occasionally be weightier, more marked and more powerful than the legal ones are. The criminal-tactical success cannot be sacrificed to the rigidity of the law, in other words the ammunition the investigating authorities have cannot be exhausted, jeopardized, weakened or 'bungled' due to the rigid interpretation and application of confrontation. In several cases it must be saved for the trial stage even if in the course of discovery the

[6] Eur. Court H. R., Cases T. v. the United Kingdom, and V. v. the United Kingdom judgments of 16 December 1999. Available in Hungarian: *Bírósági Határozatok*, 49 (2001) 497, case No. 314.

'weapon' has become known for those against whom the documents contain incriminating data.

In the course of elaborating on the issue of 'necessity', the question of who-with whom has already been touched upon,[7] in other words *who is confrontation carried out between, who are the persons who can participate in a confrontation as persons to be confronted?*

The (three) possible options can be inferred from the text of the act:

a) suspect-with suspect;

b) witness-with witness (including the victim-witness);

c) suspect-with (victim)witness.

Groups a) and b) are homogeneous in respect of form, in the case of group c) confrontation is heterogeneous, since the procedural statuses indicate similarity and difference. In the case of the latter, the order of warnings is different as well.

Heterogeneous confrontation is the most frequent in real life, in which the suspect sits face to face with the winess, quite often the victim-witness. In most of the reported Hungarian crime cases the known suspect is there alone as opposed to an average of five witnesses in a Hungarian criminal case, not all of whom are obviously capable of contradicting the suspect in important matters.

The findings of my empirical survey also show the actual investigatory ratios, out of 541 confrontations:

a) suspect-witness 247 instances (46%),

b) suspect-victim 122 instances (23%);

c) suspect-suspect 88 instances (16%);

d) victim-witness 18 instances (3%);

e) witness-witness 66 instances (12%;)

f) victim-victim 0 instance (0%).

Altogether 541 confrontations were carried out in the 186 criminal cases, which means 3 (2.9) confrontations on average. It can also be seen that due to the average number of witnesses there are more (twice as many) confrontations performed between the suspect (and as it is true in the trial stage too, the word accused can also be used) and the witness than between the suspect and the victim. Altogether the two categories (witness/victim facing the suspect), the heterogeneous group makes up nearly 70% (69) of the confrontations. Only every sixth is carried out within the homogeneous group of suspects (16%) and within the homogeneous group of witnesses (the victim) (altogether 15%).

[7] The question of how is not dealt with here, since the answer is given by criminal-tactics, and it needs a separate study.

It should be noted here that besides the homogeneity and heterogeneity of the participants, Flórián Tremmel differentiates content homo- and heterogeneity depending on whether "the source of the contradiction is a mistake on both sides or a lie on both sides, or these contradictions were created on the one side by a mistake and on the other side by a lie."[8]

3. Types of confrontation

Besides the dichotomy between homogeneity and heterogeneity, confrontations can be classified into different groups. The following classification may also be applied:

A) active (narrow)–passive (wide) (within them personal and material);
B) formal–informal;
C) replaceable–irreplaceable;
D) ex officio–upon request.

Ad A) So far I have dealt with the legal aspects of confrontation taken in the narrow sense, the detailed rules of which are laid down by criminalistics, in particular criminal-tactics. This term has another, wider epistemological interpretation as well; as I mentioned in the course of demarcating it from other investigatory-evidentiary acts, interrogations, crime-scene interrogations, identification parades, attempts to prove, crime scene investigation, search and body search, the use of polygraph and hearing experts all have elements of confrontation. Unlike personal confrontation which is active, it may be called 'passive', since the person concerned, usually the suspect, sees the scene, the proving objects and events in front of him (material confrontation). He or she is looking at them passively, though not without being touched and impressed as they (may) induce inner tension and further deliberation in the person looking. Sometimes the passive looking and facing induces the confession of the truth, the modification of a testimony and testifying or confessing itself.

A classic literary example of passive confrontation can be read in the short story entitled Brutes written by Zsigmond Móricz.[9]

The examining judge felt (knew) that the red faced shepherd and his mate had killed Curly the Shepherd and his son but failed to make the shepherd admit to it. However, when on his way out of the room the shepherd approached the

[8] Tremmel–Fenyvesi–Herke: *Kriminalisztika tankönyv és atlasz, op. cit.* 386.

[9] Móricz, Zs.: Brutes (Translated by Gulyás, Gy.). In: *44 hungarian short stories.* Budapest, 1979, 68–86.

door, and reached his hand for the doorknob, he staggered back. He could not touch the doorknob. "He could not move. He just stared and stared and a small froth appeared around his mouth." There, hanging on the doorknob, was the brass-ornamented leather belt, with which he and his mate had committed the brutal crime.

The shepherd slowly raised his hand to his head, turned back, and then confessed to his crime, "We killed Curly the Shepherd for his three hundred sheep and two donkeys."

Ad B) The former active and passive confrontations may be referred to as formal and informal confrontations. The formal confrontation is described and circumscribed by the provisions of CPA, while the informal confrontation is described in and by criminal-tactical recommendations. This statement is true even if the formal confrontation is claimed to be an institution with a double formation. It can be examined both in a legal and in a criminalistic sense and rules and recommendations can be found pertaining to it. (It should be added that considering its psychological features, it is rather an institution with a triple formation.)

All acts–occurring in any stage of the criminal proceedings–can be called informal10 in the course which confessors are faced in some form with the truth, a standpoint, some evidence, a testimony or some data different from what they have conveyed. And it applies to all possible participants of the confrontation such as thesuspect, the victim and the witness.

An example of a confession induced by an informal confrontation can be read in the ballad entitled Call to the Ordeal by János Arany[11], in which there is an informal confrontation with a dead person.

A young man was found in the woods with a dirk in his heart. "...he unto the ordeal calls / All he suspects, to view the test / Which must the guilt make manifest." First the young man's enemies are called to the dead body, then his friends, relatives and finally his beautiful lover and secret bride. When the girl appears, blood begins to flow out of the wound. Then the girl told what had happened. She didn't kill the boy, but she gave him the dirk. The boy urged

[10] Endre Bócz refers to this category by the term 'tactical' confrontation. In more detail see Bócz, E.: A kihallgatások szervezése [Arranging interrogations]. *Belügyi Szemle*, 11 (1973) 93.

[11] Arany, J.: Call to the Ordeal (translated by William N. Loew). In: Arany, J.: Toldi; Toldi's eve; Ballads; Selected lyrics (translated by William N. Loew). New York, 1914. 164–166.

her to say 'yes' or else he would kill himself. Then the girl gave him the dirk and replied him to do so.

"My heart in the truth, he did possess;
He should have known it; but, ah, woe!
He still besought another, 'Yes,'
'Or,' said he, 'to my death I'll go,'
Here, take my dirk, and end it so!"

Besides objects, persons may also informally have an effect on persons lying or deceiving.

Kálmán Mikszáth gives a wonderful literary example of it in his novel, The Noszty Boy's Affair with Mari Tóth,[12] in which Ferenc Noszty–who had already committed a bill fraud–and again wanted to get the girl with a big dowry by fraudulent means.

"You haven't heard the last of this," roard Feri and tore himself from the hands that were restraining him. "We'll settle accounts, master-baker! We'll settle accounts..."

And, his bloodshot eyes rolling ominously in their sockets, he was moving towards Tóth again with raised fists when suddenly the library door opened and a tall, handsome soldier stepped into the room and said to him sharply:

"Did you want something?"

Ferenc Noszty recoiled at the familiar voice and glanced fearfully in the direction from which the question had come.

Colonel Stromm was standing on the threshold, his arms folded, and he repeated:

"What do you want?"

Noszty's arms fell limply down and a deathly pallor came over his face.

"I want to go home, Colonel," he groaned in a pathetic, broken voice.

Ad C) The pair of replaceable–irreplaceable confrontation is connected to what has been claimed about 'necessity'. The confrontation is necessary to be performed if–among others–it cannot be replaced with anything else, if we cannot get close to the evidence in any other way, or if there is no other

[12] Mikszáth, K.: *The Noszty Boy's Affair with Mari Tóth* (Translated by Bernard Adams). Budapest. 2005. 414.

possibility. Consequently, it may be deduced from the train of thought and the wording of the act as a general rule that it is not an 'ultima ratio', neither is it to be deployed in the first place; it may only be applied if it cannot be substituted with anything else, and it cannot be applied if the elimination of the contradiction would be a tactical mistake. What can replace it? Here we can refer to the thoughts above, the classification into active–passive and formal–informal. Active and formal confrontation acts may be replaced with passive and informal ones. The 'father', the original source and the starting point of confrontation is interrogation, whose gown confrontation itself has slipped out of. Nonetheless, such may be the other special form of interrogation, the crime-scene interrogation or testifying on the spot, further, identification parades, and other open and covered data collection and requests. However, the danger of delay, 'periculum in mora' should be considered; a means which is also expedient in time, which serves the double requirement of swiftness and thoroughness of criminal proceedings and investigations is to be applied.

Ad D) By prescribing confrontation as a possible method applicable if 'necessary' instead of the former imperative of 'shall', which I approve of, the legislator has eliminated the obligation stemming from officiality, the obligation of carrying out confrontation ex officio. Consequently, even if there is a contradiction, it is not sure that there will be a confrontation. This has opened up the way in front of the theoretical and practical possibility of a petition to perform a confrontation which may come from both the subjects of the defense (the suspect, the defense counsel or the legal representative of the minor) and the victim or perhaps the non-injured witness. Petition is not the right expression, as I usually say, the defense counsel (the defense) is not a begger, he or she does not have to beg in the course of the proceedings, let alone in connection with evidencing. (The term petition to be released is appropriately replaced with the term motion in the act.) The defense can hand in a motion to perform a confrontation as part of the defense tactics. The victim is also entitled to it but the simple (non-injured) witness–quite properly–not.

The motion does not have to be agreed to, the confrontation does not have to be performed; it is at the discretion of the authorities. In the case of rejection, a resolution has to be made to this effect, against which the initiator is entitled to seek legal remedy.

4. Participatory rights and duties concerning confrontation

4.1. Presence, activity and asking questions

There at least three persons present at an investigatory confrontation (This is the main concern of my analysis), the person conducting the confrontation and the two persons being confronted. Beyond this standard, however, other persons may be present, the official keeper of minutes, the defense counsel of the suspect, the attorney of the (victim)witness, the prosecutor and in the case of an illiterate person's confrontation–upon a motion to this effect–two official witnesses at the disclosure of the minutes, since it is a special form of interrogation. All these persons have a statutory right to be present, moreover, the person conducting the confrontation may allow, if necessary, the presence of a (sign)interpreter, an expert, a psychologist, a probation officer, a legal representative, a caretaker, a teacher if the person to be confronted is a juvenile/child.

It should be noted here that the Constitutional Court has touched upon the issue of confrontation only once and only indirectly. It declared the unconstitutionality of the situation concerning the application of official witnesses by a majority decision. I myself agree with Árpád Erdei, who expressed a concurring opinion claiming that "the mere presence of an official witness at the confrontation entails his/her gaining an insight even into the most intimate details of the person(s), private individual(s) concerned (for example body search and house search)". It should be added that it applies to confrontations too, for instance one carried out in connection with a sexual crime (committed within the family).

Árpád Erdei added, "The effective act on criminal procedure excludes even client-publicity in the case of most investigatory acts. Thus it does not allow the presence of either the suspect or the defense counsel at the interrogation of witnesses whose interrogation has not been requested by them, excludes them from the confrontations between the witnesses, and even makes confrontation omissible. Taken all this together, it may be suggested that the presence of official witnesses is not required either by the efficiency of the investigation or by any noticable interest of the authorities. The advantages that used to be entailed by the application of official witnesses are now repleceable by other methods which better serve the prevalence of objectivity, and do not jeopardise the interests of others. The continuously expanding technical possibilities and methods which are also referred to by the act are suitable for eliminating all the disorders and abuses which the application of official witnesses automatically entail even in the case of a guarantee system satisfying higher

level requirements than those at present. It follows, that Section 183 of CPA, allowing for the application of official witnesses, is unconstitutional because it unnecessarily and disproportionately restricts the rights laid down in Article 59. (1) of the Constitution."[13]

A further issue may be whether only the leading defense counsel or all the defense counsels may be present in the case a suspect has more than one defense counsel. The act does not govern this issue; in my view only the leading defense counsel or an attorney or a legal trainee substituting him or her may be present. The size of rooms available for confrontations, the tactics of confrontation and the psychological requirement according to which the number of the 'adversary' should not be too large, it should not weigh on or be a psychological burden and pressure on the victim, on the witness or in rare cases on the other suspect.

The same 'self-restraint' is to be voluntarily imposed on the investigating authority, since it may seem to be too much of pressure and forced interrogation if several persons queued up behind the investigator keeping the minutes as if showing off strength, which might induce fear and intimidate any of the persons to be confronted.

In the case of a witness-witness confrontation, the question arises as to whether the defense counsel of the suspect may be present or not. Under the general rule of the effective Hungarian regulation, the defense counsel may only be present at the interrogation of his own witnesses. Considering that confrontation is a combined form of interrogation, this rule is applicable and has to be extended to cover it: the defense counsel may be present at a confrontation (the authority has the duty of notice) where one of the participants is a witness whose interrogation has been requested by the defense counsel. A counterargument may be that in this way the defense counsel might have access to the contents of the testimony of the other side's witnesses whose interrogation he was not present at and the minutes of which he has no copy of. The authorities have two ways to eliminate this concern: they either omit the confrontation for a tactical reason in the interest of the success of the investigation or postpone the confrontation until right before discovery when there is not too much left to hide from the defense.

The presence of both the witness–provided he or she cannot refuse to testify, there is no obstacle to it, or he is not exempt–and the suspect may be enforced. A witness may be brought in if he fails to attend and may be fined for not testifying. If the witness still does not open up, it brings about the criminal law threat of perjury, though only at a theoretical level. Certainly, a

[13] Decision No. 43/2004 (17. 11) AB of the Constitutional Court and the concurring opinion attached to it.

kind of a block which the authority has to remove by criminal-tactical means has occurred or the confrontation has to be cancelled due to fear, intimidation, psychological block, etc. which the witness himself may indicate. There is no point in increasing tension to the breaking point and stubbornly insisting on the confrontation of a witness who is blocked, since in such a situation no positive result can be expected. To the contrary, the witness may be expected to become more reserved and frightened, which does not do any good to the whole case or procedure.

The suspect can also be forced to attend the venue of the confrontation, he or she has to appear once summonsed, however, it is pointless if the suspect, fully aware of all legal warnings, stated in advance that he would not make a confession at the confrontation. Forcing a confession would violate the Miranda principle, further, in my view forcing the suspect to make a confession against his own will and intention arouses the suspicion of a forced interrogation. Once it has been stated that confrontation is a special, combined interrogation, the rules of interrogation obviously apply to it as well, according to which in case of refusal, even putting questions is forbidden. A confrontation is, however, started by asking a question and is continued by doing so again.

It may occur, and I have conducted some empirical research into this, that the suspect might be present, he may not have been able to avoid it, nonetheless, he does not look into the other's eyes or horribile dictu even lowers his head, closes his eyes or reads his notes, in other words shows total passivity (frivolousness) or resistance. There is no efficient means for preventing it, the person conducting the confrontation can do only one thing. The confrontation must immediately be terminated, as no success can be expected due to the lack of the psychological basis, further, this can stop the suspect from further 'taking the air' and possibly obtaining information from the other party.

The situation in the courtroom is totally different. One of the persons to be confronted is already there, (just like the defense counsel, the attorney of the witness, the legal representative of the victim, the experts, etc.) he will hear the other contradicting suspects and witnesses, thus, following the passive (informal) confrontation, there can be no power of surprise, the formal confrontation can have no real strength. Besides, –as I have already mentioned–by the end of the investigation he has got to know or may have got to know the standpoints of persons making contradicting testimonies, which also weakens the chances of a successful confrontation.

According to the wording of the act, the persons being confronted may ask each other questions but this seems to be possible only after the authority has put its questions. This is in conflict with criminal-tactical requirements, since real confrontation develops through an argument which, of course, must be

channelled appropriately. I regard it redundant and unnecessary to grant the right to ask questions in a statute, as the content-requirements of confrontation are defined by criminal-tactics (and the person performing it) but these detailed rules must not be listed in the framework of criminal procedure law.

In my view, as it is a special form of interrogation, the defense counsel, the attorney of the witness, and the legal representative of the victim may ask questions but only once the questions between the authority and the persons being confronted have been asked and recorded. The answer to a question asked by a 'quasi investigator' must be given by looking into each other's eyes and not to the person asking the question.

4.2. Taking the minutes and its copy

Under the effective CPA minutes must be taken of the confrontation, while formerly a report could be drafted in misdemeanour procedures. It should be noted here that in my opinion minutes should only be taken if the formal confrontation has some result, namely one or both of the persons confronted have changed their testimonies. My argumentation is supported by the following:

– It would make the procedure simpler and quicker if the investigator could record unsuccessful confrontations in reports. Usually no minutes are taken of negative (unsuccessful) investigatory acts and data collections, for instance of the fact that a person interrogated near the scene does not know about the case or knows only about irrelevant facts.

– Only successful confrontations providing a result or a change deserve attention in the course of the rest of the procedure, but then taking the minutes is important due to the Miranda warnings and the evidentiary force of the testimony.

– In the trial stage it is also recorded in one practical sentence only, "the confrontation has yielded no result".

– My main argument is that during the preliminary proceeding the investigator performing the confrontation could focus on the core of confrontation: the atmosphere, inducing tension, genuine clashing, sharpening the actual counter-front-statement, the personality of the persons being confronted, bridging the gap between them, observing the person (presumably) making an untrue testimony, the tactics of confrontation based on criminal-psychology, and moves in the direction of the result.

– Taking the minutes/dictating, mainly in the case of persons not very good (but also who are good) at typing/dictating engages attention and consumes energy, makes the person conducting the confrontation unfocussed, disorganised

and scatterbrained and by giving substantial time for preparation, provides an escape pursuit for the liar who perceives that the person conducting the confrontation is uncertain and unfocussed. In this atmosphere, in the obscurity of typing, the other person telling the truth also weakens and fades away gradually, then eye-contact disappears, as 'there is nobody to shepherd the flock'.

I fully approve of the fact that the two-coloumn composition of recording advised in books on criminal-tactics and used from the 1960s to the 1980s has disappeared from practice. On the one hand, the computer softwares and forms used by the police do not apply this form. (I can only hope that partly because the editors came to the same conclusion as my aforementioned argumentation proposing simplification.) On the other hand, even law enforcers realised that it made taking the minutes of the confrontation even more complicated, more tiring, and slower. The two-coloumn composition of recording has never made any sense, neither has verbose and babbling minutes.

Confrontations may also be recorded technically, following the taperecoding[14] which has been used for decades, now (even digital) videorecording can also be applied. All the more so as this can record images not only voices. The whole procedure becomes visible for us afterwards, which may especially be valuable if either of the persons confronted has made a change concerning an essential, relevant, and material fact. It may strengthen the authenticity and the evidentiary force of the confession and it is true for the trial stage and for the scope of discretion applied there too. The recording can certify the fairness of the procedure, and can prevent a result achieved there going into the group of excluded evidence.

A debated question is *whether to record the official remarks about the perceived communication and metacommunication signs in the minutes together with any reference to the successfulness or unsuccessfulness of the confrontation at the end of the minutes.*

With regard to the first question, the findings of my research into the psychological basic features show that no certain conclusions concerning truth coverage or lying can be drawn from non-verbal signs (sweating, crossing legs, scratching, etc.). Consequently, their recording is also unnecessary, neither are they good for guidance, they may even influence and mislead subsequent readers of the minutes. Thus, also prosecutors and judges. It is one-sided because either the defense counsel, the suspect, or any of the persons confronted might request their inclusion into the minutes. The suspect may claim the same with

[14] A detailed study on the then modern taperecording: Bócz, E.: Szembesítés magnetofon alkalmazásával a nyomozás során [Confrontation and the use of a taperecorder in the course of investigation]. *Ügyészségi Értesítő*, 2 (1965) No. 4.

good reason; once the authority records such things about him, why could not his observations be also recorded. Under such circumstances I am rather happy than discontented with the small number of the records of metacommunicative signs I found in the course of my empirical research.

I regard the recording of successfulness/unsuccessfulness–contrary to the recommendations of many investigating instructions–absolutely unnecessary and pointless. It should be enough to simply report an unsuccessful confrontation–as it has already been stated. However, due to the obligation to take minutes, as it is a special form of interrogation (especially if one of the participants is the suspect, since then taking the minutes is obligatory anyway), the outcome is obvious from the content. On the other hand, if there is a positive result, the consecutive (one-person) interrogation of the person making a change is desirable as may be the taking of the minutes of the crime scene interrogation. This will clearly show that the confrontation has been successful. If no interrigation follows, it may not be appropriate from the point of view of criminal-tactics to 'blab it out' to him in writing that there has been a sort of shift or change, the authority has obtained some new infromation during the confrontation. In such a case there is no need for calling attention to it by declaring it. I have not been able to find one single argument in favour of it, only arguments against it. The question must be asked as to why the authority deemed it necessary to put that sentence at the end.

Defense may get a *copy* of it for free (since April 2006), after–upon the initiative of among others, this author[15]–the Constitutional Court has adopted its decision, concerning this issue, complying with European standards and the requirement of due process including the equality of arms.

ccording to the general rule, the copy is not for free in the case of a victim-witness; however, if the official of the authority allows–and he can do so if it does not harm the interest of the investigation–a copy to be issued to him, the witness has to pay for it, actually HUF 100 per page.

I agree with the provisions pertaining to copies, I do not consider their amendment necessary or desirable.

4.3. Legal remedy

As each coin has two sides, a complaint may be lodged by the defense (the suspect or the defense counsel). On the one hand because of performing a

[15] Csorbul-e a védelem alkotmányos elve az iratmásolás illetékeztetésével? [Is the constitutional principle of defense victim by imposing a duty on copying documents?] *Belügyi Szemle*, 47 (1999) 45.

confrontation, on the other hand because of omitting it. If the suspect states it in advance on record (or in a self-testimony) that he does not intend to take part in a confrontation and he does not intend to make a testimony in the course of it, there is an obstacle to the confrontation. Even forcing him to attend against his own will is not useful. Even subsequent to the CPA coming into effect, i.e. even in 2003 (unfortunately quite frequently before it), the authorities conducted 'one-party' confrontations where the suspect refused to make a testimony, and exercised his right to silence, nevertheless a 'one-sided' confrontation was carried out. Mainly due to being afraid of the prosecutor sending the case back for 'supplementation'. Fortunately, this practice, resembling forced interrogation, and going against the Miranda-principle, which was unfortunate even for criminal-tactical reasons (e.g. the suspect could obtain data and information), was abandoned in a few months as the result of the position of prosecution applying the appropriate interpretation.

The defense counsel of the suspect sometimes 'objected to' performing a confrontation in advance, prior to the confrontation. I might say, he submitted a motion for not conducting the confrontation. However, such a form does not exist; defense may only note that according to its position the confrontation is not desireable or even unlawful for some reason. Thus, there is no advance legal remedy in the case of confrontation either, it can only be simultaneous with the implementation of the act or subsequent to it.

Concerning this issue, there is a guiding court decision illuminating for the defense too, in which a defense counsel was found guilty of defamation. The counsel made the following statement before the confrontation of his client, "I am objecting to the hearing of this woman and to her confrontation with my client because she is the person who reported to the police and she is banned from the territory of the district anyway." The court held that only the statements of defense made in the framework required for deciding the case are privileged and this statement was not in this category. Confrontation is a means of evidencing the performance of which does not depend on the previous record of the parties, neither on their possible objectionable conduct.[16]

If defense submits a motion for the performance of a confrontation, the authority must handle it in line with the rules of evidentiary motions. It must either be approved of and then performed, or not approved of and rejected by a resolution in writing against which a complaint may be lodged which will be decided on by the prosecutor in charge of the investigation (or the superordinate prosecutor).

[16] Court Decisions 1989, case no. 6. (Municipal Court of Budapest, 20. Bf. I. 5766/1988.)

Defense may complain about the fact of the investigatory confrontation and the way of its performance too. The complaint, however, has no delaying effect, thus the authority first performs the confrontation and only later decides about the legal remedy. A complaint may be directed against the conduct of the investigator and against the actual implementation too, alleging that it was biased, humiliating, suggestive, leading, treating the person concerned as guilty, degrading, violent, rough, etc.

Confrontation is ordered in the form of an order guiding the proceedings aginst which no legal remedy is available. The defense, the attorney of the witness, or the legal representative of the victim may also note here that there is an obstacle to confrontation, it is not desireable and may request the court to omit it.

5. The probative force of confrontation, excluded evidence

The purpose of the whole criminal procedure including the investigation is to hold a proper mirror, ascertain the real (true) facts of a necessarily past act, a process of acquiring knowledge, in the course of which it can be decided whether a crime has been committed (can be prosecuted), who the offender is, and whether he is punishable.[17] In the course of investigation, the facts establishing criminal responsibility are to be collected, relevant evidences are to be detected and collected on the basis of which the prosecutor can decide whether there is enough evidence for arraignment, for committal for trial or not.

According to László Pusztai László, "Cognition is a progression from not-knowing to knowing, from defective and imperfect knowledge to ever enriching and more and more thorough knowledge".[18] Regarding the fact that the act to detect is a past and usually a concealed, a hidden, and a covered act, it is often a difficult–even–painful process to grasp reality through senses and experience, and to detect evidence related to reality at the beginning and in the course of the whole process. This process may be facilitated by the mental-assessing activity of the authority trying to infer a past cycle of events from the present. In this framework it sets up hypotheses and versions. It deems something true and tries to confirm or refute it subsequently by evidence collected in the course of investigation. Confrontation as an act of investigation-evidencing in

[17] For more details see: Barna, P.: *A bűnüldözés elvi kérdései* [Theoretical issues of criminal investigation]. Budapest, 1971. 376.

[18] Pusztai, L.: *Szemle a büntetőeljárásban* [Review in criminal procedure]. Budapest, 1977. 422.

which the authority has some sort of version or conjecture if not a pre-conception fits into this train of thought. As the authority often has a bunch of evidence, however modest, and a hypothesis, upon noticing the contradictions between the testimonies, it starts out from the presumption that somebody has told the truth while the other person has told something untrue (a lie). Confrontation is meant to move this uncertainty into a direction, since if everything was certain, clear and unambiguous, the procedure of confrontation would become unnecessary and a kind of over-evidencing. The purpose is to move from uncertainty towards certainty; it is an attempt to check existing versions and conjectures. Certainty may mean the exclusion of a version, and it may also be valuable, because it may show that the route is wrong, investigation might reach a deadlock, there is no point in taking that route so it must be quitted. A positive attempt confirming a version is not a complete success, taking the possibility that a confrontation may induce a suspect who has denied up to that point to change or perhaps make a confession which may not be real, full, and precise.

Is a testimony evidence, what force does it have?

According to one content-pillar of the warnings based on the Miranda-principle– which the suspect to be confronted will get to know –, "anything you say can be used as evidence". On this ground all his words and sentences uttered during the confrontation can be used as evidence. This thought is strengthened by our definition, according to which confrontation is a special form of interrogation and the minutes of the confrontation as the testimony of the suspect is included in the evidences. However, at the same time this weakens the argumentation, i.e. its independent existence as evidence. It is rather of a supplementary and subsidiary nature, according to Flórián Tremmel[19] the 'amplified/supplement-evidence' nature of the testimony made during confrontation is shown. It will become really valuable if following the 'test of trustworthiness', the probative force of the words and the testimony is strengthened and made unambiguous in the framework of an individual interrogation or a crime scene interrogation (on-the-spot interrogation). In the quoted case of the suspect, he makes a detailed confession, a confession with a 'perpetrator's mind', which can be checked.

In the case of confrontations assessed to be successful, the party being confronted sometimes simply says, "so it happened", which indicates a wish to

[19] See: Tremmel, F.: *Bizonyítékok a büntetőeljárásban* [Evidences in criminal procedure]. Budapest–Pécs, 2006. 178.

get released from the situation of the confrontation rather than self-incrimination based on a genuine intent to change or confess which can be regarded as evidence.

I do not deny the right of the authority in the final instance that of the court to have discretion in regarding what has been uttered during confrontation as evidence but I deem it appropriate only with the above restrictions and additions.

Finally, when evaluating evidence, it must also be examined *whether it has been obtained lawfully in compliance with the requirements of a constitutional state founded on the rule of law and (European) human rights.* The forms of negative conduct on the side of investigating-authority mentioned in the section on legal remedy may reach a level at which the possible result cannot be admissible, cannot be included among the lawfully obtained evidences and must be excluded. Such can be evidence obtained in a manner contravening the provisions of CPA, in other words, evidence obtained unlawfully, including–but not limited to–the following cases:

– the person conducting the confrontation uses violence against either of the parties being confronted;

– the person conducting the confrontation threatens either of the parties being confronted;

– the person conducting the confrontation fails to give the warnings (concerning the rights and duties) appropriate to the status of the parties to be confronted;

– the official conducting the confrontation records falsities in the minutes and/or falsify the contents of the minutes;

– the official violates the rules of criminal-tactics to such an extent which injures the fairness of the investigating act (e.g. sits/stands more than one person facing the other, continuously puts pressure on the persons being confronted, puts leading-influencing-suggesting and/or deceiving questions with an untrue basis).

Infringements of the law concerning confrontation may occur during the trial stage too, the consequence of which is necessarily a procedural non-compliance.

The court has declared such non-compliances in its guiding decision when satating:

"An unconditional procedural non-complience occurs when the court of first instance conducts a trial and takes evidence in the absence of the suspect, contrary to the statutory provision prescribing the presence of the suspect."

The accused of the first order failed to appear at the trial of the first instance on 21st of March 2003, though duly summonsed. In spite of it, the

court examined K. Gy. as a witness, who gave evidence concerning the act committed jointly by the accused of the second and third order, thus the court conducted evidencing. According to the record, the necessity of the confrontation was replaced by allowing K. Gy. to give evidence in writing. This act of evidence was not repeated in the presence of the accused of the second order during a subsequent procedure.[20]

It declared in another case: "During the interrogation of a child or a juvenile, the presence of his caretaker and teacher is not compulsory; it is a procedural non-compliance if the court excludes the testimonies of such witnesses made in the course of the investigation from the evidences."

The court of first instance excluded the testimonies made by J. B., juvenile and G. B., child in the course of the investigation, and also excluded the confrontations. The court based its decision on the fact that these witnesses were interrogated late in the evening and late at night without the presence of their legal representatives.[21]

6. Summary

In conclusion to the study it may be claimed that the concept and the types (classification) of confrontation is clear. As an evidentiary procedure, it can be well demarcated and distinguished from other applicable means of seeking the truth in CPA and beyond it in the area of criminal-tactics. Thus, from interrogation, identification parade, attempt to prove, crime scene interrogation, search/body search, parallel hearing of experts, polygraph and cross-examination.

Contrary to jurisprudence and the intention of the legislator, the emphasis of confrontation is still on the investigatory and not on the trial statge, which I myself support mainly on the basis of criminal-tactical arguments.

I propose the amendment of the statutory regulation in force to the effect that the application of confrontation should be excluded in the case of children,

[20] Court Decisions 2005, case no. 100. (Legf. Bír. Bfv. [Supreme Court criminal appeal cases] III. 613/2004.) This interpretation coincides with Court Decisions BH 1987. case no. 187. "Evidence taken by a court of first instance during a trial in the absence of the accused does not constitute an unconditional annulment, provided evidencing is repeated subsequently in the presence of the accused." (Eln. Tan. B. törv. [Supreme Court Presidential Department criminal cases] 1426/1986.)

[21] Court Decisions 1996, case no. 520. (Supreme Court, Legf. Bír. Bf. I. 245/0996.)

further, the persons conducting confrontation should be provided with the possibility to record in a report–instead of the minutes.

Finally, I claim that there is no such a thing as a compulsory confrontation and there are methods of confrontation which lead to the exclusion of evidence.

In my view–based on research optimism–the consideration and application of these ideas in legislation and law enforcement may result in a higher level of efficiency and success, which is in the interest of all law-abiding citizens.

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ISP Liability for Third Party Copyright Infringement: A Comparative Analysis for Setting International Standard Norms

Abstract. The rapid expansion of the Internet has greatly expanded the context in which copyright infringement can occur. ISPs largely remain the gateway through which end users access the vast flow of digital content traveling throughout cyberspace. Unfortunately, ISPs are at the receiving end of many disputes involving IPR violations. The difficulty in pinpointing the real culprit has resulted in a situation where the ISP is often taken to the court.

The paper examines such situations where the ISPs have been involved into litigations for third party copyright infringement across the globe. An attempt has been made to highlight the problems in such litigations and how it has affected the industry. An analysis has been made of all the laws passed by the legislations of various countries which has created a limit in the liability of ISPs in various countries if the ISP follows certain guidelines. Special emphasis has been given to the decisions of the courts of these countries after the creation of such limitations and an analysis has been done of whether such exceptions have infact served the purpose or not. Finally the paper is concluded with the basic purpose and theme of the paper which is to create an international standard guideline and in doing so the point that the individual countries legislations wont have an effective control over the problem has been highlighted and this is the reason why an international body like WIPO and WTO has to enter to control the situation.

Keywords: ISP, copyright infringement, internet, DMCA, copyright, internet service providers

I. Introduction

Copyright law aims to balance the competing policy goals of encouraging creativity and allowing public access to information.[1]

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[1] See Weinstock-Netanel, N.: Asserting Copyright's Democratic Principles in the Global Arena. *Vanderbilt Law Review*, 51 (1998) 217, 220. This balance is particularly important and difficult when it concerns the Internet, where meaningful copyright protection must exist in order to promote further intellectual development in the Internet

The Internet with which we are all familiar is a gigantic network of computer networks. The amazing capability of the Internet to promote the exchange of knowledge, information, and ideas on a universal scale has surely revamped the way people interact. It has been due to the internet that knowledge capital has been able to be communicated to others and recognized.

The rapid expansion of the Internet, however, greatly expanded the context in which copyright infringement can occur. The Internet, with its inexpensive access, quick downloads and forwarding capabilities allow users to effortlessly bypass copyright laws at a substantial cost to legitimate users.

The Internet Service Providers[2] have played a very important role in the development of the Internet. Even as the Internet continues to evolve, ISPs largely remain the gateway through which end users access the vast flow of digital content traveling throughout cyberspace. Unfortunately, ISPs are at the receiving end of many disputes involving IPR violations. The difficulty in pinpointing the real culprit has resulted in a situation where the ISP is often taken to the court. The courts of United States and some other countries have confronted this issue since the early nineties. In 1996, The World Intellectual Property Organization[3] concluded negotiations to introduce new rules and clarify existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments. Subsequent to this, various countries like United States, Australia, Singapore, India along with some other countries have enacted legislations in this regard.

This article reflects upon the evaluation of the legal environment of these countries and concludes with the proposal to set an international standard norm.

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and failing to provide protection would lead to a reduction in the incentive to create and less material available for public use. Therefore, it is important that copyright owners are protected and compensated for infringements occurring over the Internet. See Mercurio, B.: Internet Service Provider Liability for Copyright Infringements of Subscribers: A Comparison of the American and Australian Efforts to Combat the Uncertainty. *Murdoch University Electronic Journal of Law*, 9 (2002) 51.

[2] Hereinafter referred to as 'ISP'.

[3] The World Intellectual Property Organization (Hereinafter referred to as 'WIPO'.) is a specialized agency of the United Nations. It is dedicated to developing a balanced and accessible international intellectual property system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest. WIPO was established by the WIPO Convention in 1967 with a mandate from its Member States to promote the protection of IP throughout the world through cooperation among states and in collaboration with other international organizations. Its headquarters are in Geneva, Switzerland. See "What is WIPO"; Accessed from http://www.wipo.int/about-wipo/en/what_is_wipo.html

II. What is an ISP?

Before examining the liability of ISP it becomes essential to have a brief examination of ISP. These are companies or corporations that enable clients to connect to the Internet. Just as in any other business, ISPs may range from conglomerates to small companies having only a handful of clients. Typically, an ISP provides its clients with more than just an email account and access to the web; it offers facilitation to upload files including web pages to the ISP's publicly accessible servers, enabling users to access these files.[4]

III. The liability of ISPs – a controversial topic

The liability of ISPs in cases of Copyright infringement is one topic which has generated lot of fiery debate throughout the globe. The legislation of various countries and the case laws decided especially by the United States Courts helps in deciding the true position of ISP liability in today s era. It also becomes particularly necessary to limit the unlimited liability for ISPs in cases of copyright infringement.

While the Internet has helped artists, educators, researchers, and publishers explore and conquer their markets with their knowledge capital, the very same technology also makes it possible for copyright pirates to copy and distribute anything present on the Internet, while remaining both anonymous and undetectable. Copying is the easiest thing one can do on the Internet, and so has become a valid concern for IPR holders who urge that something be done quickly to address this menace. Identifying the individual who posts allegedly infringing material is not an easy task, whereas spotting a financially solvent ISP to impose liability can be the easiest and most obvious route for a copyright owner. With technical ability to close subscriber accounts, ISPs need to share with copyright owners the responsibility of curtailing and preventing infringement. Creating unified substantive international copyright law remains an impracticable solution to the mounting problem of global scale infringement.[5]

[4] Unni, V. K.: Internet service provider's liability for copyright infringement- how to clear the misty Indian perspective. *Richmond Journal of Law and Technology*, 8 (2002) 13.

[5] Soma, J. T.–Norman, N. A.: International take-down policy: a proposal for the WTO and WIPO to establish international copyright procedural guidelines for internet service providers. *Hastings Communications and Entertainment Law Journal*, 22 (1999–2000) 391.

The provisions for ISP liability in different parts of the world have been discussed below:

A. The American perspective

Before the enactment of the *Digital Millennium Copyright Act*[6] 1998, relatively few cases determined the ISP liability in Copyright infringement cases. In 1998, Congress adopted § 512 of the DMCA, a legislative attempt to formalize structured immunities for ISPs, clarify the rights of copyright holders, and otherwise react to infringing content and conduct plaguing the Internet's new digital regime.[7]

A.1. The historicalneed for ISP Immunity–The pre DMCA era

The ease with which ISPs were brought into costly litigations for copyright infringement without any error on their part has created problems for the ISPs.

There are three theories under which ISPs are potentially liable for their subscribers' copyright infringement: direct,[8] vicarious[9] or contributory[10] infringe-

[6] Hereinafter referred to as 'DMCA'.

[7] The Constitution of United States authorizes Congress to establish a legislative scheme "to promote Science and the useful Arts, by securing for limited Times to Authors ... the exclusive right to their ... writings..." See U.S. Const. art. 1, § 8, cl. 8. See Also, Hsieh, L.–McCarthy, J. M.–Monkus, E.: Intellectual; Property Crimes. *American Criminal Law Review*, 35 (1998) 899.

[8] A finding of direct copyright infringement is based on two factors: 1) the plaintiff's ownership of a valid copyright and 2) a defendant's violation of one of the plaintiff's exclusive rights. The 1976 Copyright Act imposes strict liability for direct copyright infringement, but knowledge is relevant to an award of statutory damages.

[9] Although the Copyright Act does not expressly provide for vicarious liability, courts have consistently imposed vicarious liability when two factors exist–"the right and ability to supervise" the primary infringer and a "direct financial interest in the exploitation of copyrighted materials." See Alfred C. Y.: Internet service provider liability for subscriber copyright Infringement, enterprise liability, and the first amendment. *Georgetown Law Journal*, 88 (2000) 1833.

[10] To be liable for contributory infringement, the defendant must know of the activity constituting the infringement, and induce, cause, or materially contribute to it. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Gershwin Publ'g Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159 (2d Cir. 1971).

ment.[11] The pre-DMCA era was marked by cases addressing each type of liability, some of which have been discussed below:

A.1.1. Playboy enterprises, inc. V. Frena–the beginning

The very first case regarding an IPR violation committed on the Internet came in 1993. But the *Playboy*[12] case, dealt with the liability of a Bulletin Board Service[13] operator, rather than that of an ISP. Fee-paying subscribers could upload and download photographs on the BBS. Playboy owned exclusive copyrights for many of these photographs. Frena claimed that it had not uploaded any of Playboy's images to the BBS and had removed those photographs from the BBS on becoming aware about it.

The court found the BBS operator liable for direct copyright infringement because it supplied a product containing unauthorized copies of a copyrighted work. It does not matter that defendant claims it did not make the infringing copies itself.[14] This position was reaffirmed in *Sega Enterprises Ltd. v. MAPHIA*.[15]

A.1.2. The Netcom decision: move toward safe harbors for ISPs

A couple of years after Playboy case, a California federal court reached a different conclusion in *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*[16] In Netcom, a user posted copyrighted material of the Church of Scientology on a Usenet newsgroup that was connected to the Internet through the ISP.[17]

[11] Salow, H. P.: Liability immunity for internet service providers–how is it working? *Journal of TechnologyLaw and Policy,* 6 (2006) 1.

[12] *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

[13] An electronic bulletin board ("BBS") consists of electronic storage media, such as computer memories or hard disks, which are connected to telephone lines by modem devices, and are controlled by a computer. Users of BBSs can transfer information from their own computers to the storage media on the BBS by uploading the information, or they can download information from the BBS onto their computers. See *Sega Enterprises, Ltd. v. MAPHIA*, 948 F. Supp. 923, 927 (N.D. Cal. 1996 ("Sega II"). [Hereinafter Bulletin Board Services is referred to as 'BBS'.]

[14] See *Playboy Enterprises, Inc. v. Frena... op. cit.* 1556. The court, citing the Copyright Act's strict liability standard, rejected the BBS operator's argument that it was unaware of the infringement.

[15] 857 F. Supp. 679 (N.D. Cal. 1994).

[16] 907 F. Supp. 1361 (N.D. Cal. 1995) ("Netcom").

[17] *Ibid.* 1365–1366.

Because a finding of direct infringement would result in liability for every single Usenet server in the worldwide link of computers transmitting the infringing message to every other computer, the court held liability better resolved under "the rubric of contributory infringement," a scheme more capable of addressing the complex relationship between ISPs and subscribers[18] and is made out if the ISP knew or should have known of the infringement and had substantially induced, caused, or contributed to that conduct.[19] A claim of vicarious liability could be sustained where the right or ability to control the infringing conduct exists and financial benefit, directly attributable to the infringing content, accrues to the ISP.[20]

Unfortunately, from an academician's point of view, the case settled before trial. But, the decision in this case made it crystal clear that an act of volition is a prerequisite to copyright liability. This was surely good news for American ISPs.

A.1.3. Sega II *case–a new approach by court to different theories of liability*

In *Sega II*,[21] the same Netcom Court relying on its earlier decision in Netcom, again refused to find a BBS operator liable for direct infringement stressing that the BBS operator did not upload or download the infringing files himself and thus did not directly cause the copying.[22] However the court found the BBS operator liable for contributory infringement because it knew that BBS subscribers were copying Sega's video games.[23]

[18] *Ibid.* 1369.

[19] *Ibid.* 1382.

[20] See Bretan, J.: Harboring doubts about the efficacy of § 512 immunity under the DMCA. *Berkeley Technology of Law Journal*, 18 (2003) 43, 46. See also Hayes, D. L.: Copyright Liability of Online Service Providers. *The Computer and Internet Law*. 19 (2002) 15, 19. Although Hayes notes that at least one court relied on Netcom to establish no direct financial benefit where an ISP charged a flat fee for its services, Hayes suggests that the Netcom holding, which heavily relied on the district court ruling in Fonovisa, has been imperiled by subsequent findings. Namely, the Ninth Circuit's reversal on the issue of financial benefit in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (establishing sufficient benefit to auction owners based on admission fees and concession sales) and a similar result in *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (establishing financial benefit based on the draw that infringing content has on users of the service) make any future reliance by ISPs on Netcom to establish no financial benefit a more risky proposition.

[21] *Sega Enterprises Ltd. v. MAPHIA* ; 948 F. Supp. 923, 927 (N.D. Cal. 1996).

[22] *Ibid.* 932.

[23] The BBS operator admitted that users were allowed to upload and download Sega games from his MAPHIA BBS. Moreover, evidence indicated that he tracked, or at least

A.2. The DMCA*–the basic framework and application of § 512*

The U.S. Congress passed the DMCA on October 28, 1998 as an effort to set a standard of copyright protection on the Internet.[24]

The DMCA limits ISP liability for third-party copyright infringement where the ISP complies with a detailed system of notice and take-down.[25] It limits liability for four general categories of ISP activity: 1) transitory digital network communications,[26] 2) system caching,[27] 3) information residing on systems or networks at direction of users[28] and 4) information location tools.[29]

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had the ability to track, user uploads and downloads. Sega II, *Sega Enterprises Ltd. v. MAPHIA... op. cit.* 928.

[24] The DMCA was enacted to as part of the US's effort to implement the WIPO treaty, and, while it is comprehensive relative to case law which existed prior to its enactment, some procedural nuances remain to be defined. The DMCA effectively gives legislative backing to the principle laid down in RTC v. Netcom by codifying its ruling that passive automatic acts shall not become grounds for a finding of online copyright infringement. There still exists no international standard for ISPs to follow with respect to copyright infringement. "There is no such thing as an 'international copyright' that will automatically protect an author's writings throughout the entire world. Protection against unauthorized use in a particular country depends, basically, on the national laws of that country." See Soma–Norman: International take-down policy... *op. cit.* 411.

[25] In its broadest definition, the term "notice" will refer to information an ISP receives that indicates infringement is occurring on one of its systems. "Take-down" will refer to the process whereby an ISP removes or disables access to material stored in or traveling through its networks. See Soma–Norman: *ibid.*

[26] 17 U.S.C.A. § 512(a). The first type of safe harbor, transitory digital network communications, can be characterized as "passive conduit" activity. For purposes of this safe harbor, a service provider is defined as "an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."

[27] 17 U.S.C.A. § 512(b). The second type of safe harbor, system caching, refers to the process by which ISPs temporarily "store material on a system or network," as part of managing network performance, in order to "reduce network congestion generally" and speed access to popular sites.

[28] 17 U.S.C.A. § 512(c). The third type of safe harbor activity is storing material for subscribers on a system or network controlled or operated by the service provider. Examples of such storage include providing server space for a user's web site (web hosting) or for a chat room.

[29] 17 U.S.C.A. § 512(d).

In order to qualify for any of these liability limitations, or safe harbors, an ISP must meet the following eligibility requirements. First, it must adopt, reasonably implement and inform subscribers of a policy for terminating repeat copyright infringers.[30] Second, it must accommodate, and not interfere with, standard technical measures.[31] In addition to these basic eligibility requirements, ISPs must also meet the specific criteria for each of the four safe harbors.[32]

[30] 17 U.S.C.A. § 512(i)(1)(A).

[31] 17 U.S.C.A. § 512(i)(1)(B). A standard technical measure is a technology, subject to certain conditions, used by copyright owners to identify or protect copyrighted works. The technical measure must have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary multi-industry standards process, must be available to any person on reasonable and nondiscriminatory terms, and must not impose substantial cost on service providers or their systems and networks. See 17 U.S.C.A. § 512(i) (2).

[32] The conditions that apply to first type of carriers are that the If the ISP does not select the recipients of the infringing content, the content must have been transmitted through an automatic technical process32 and the ISP must not retain intermediate copies of the content for longer than necessary to transmit the information32 then, it receives immunity from monetary damages. See 17 U.S.C.A. § (a)(2)–(3)

For the Second type of Safe Harbour, the transmission must be initiated by a third party, transmitted through the system to a second user, and stored via automatic processes. See § 512(b)(A)–(C). However, unlike protection for transitory communications, this subsection only limits liability for those service providers who, upon notification, "respond expeditiously to remove, or disable access to, the material that is claimed to be infringing." See § 512(b)(E)

The Third type of safe harbor protects those ISPs that receive no financial benefit "directly attributable to the infringing activity", where the provider has neither the right nor ability to control the activity and where, if properly notified, the ISP suppresses access to the infringing content. See § 512(c)(1)(B)–(C). However, it does not protect ISPs with actual or constructive knowledge of infringing content who do not, on their own initiative, move quickly to disable access. See § 512(c)(1)(A)(i). However, § 512(c)(1)(C)(2)–(3) additionally details the need for ISPs to provide agents charged with handling infringement notifications on their behalf and enumerates the elements constituting notification sufficient to shift the liability burden back on to the ISP.

Lastly, under § 512(d), ISPs are granted immunity for the "information location tools" that provide links to "online location[s] containing infringing material or infringing activity ... including a directory, index, reference, pointer, or hypertext link." But § 512(d)(1)–(3) provides that actual or constructive knowledge of the infringement proves fatal, but § (c) makes clear, takedown upon notification and the absence of direct financial benefit preserves the immunity.

A.3. Court's interpretation of the provisions of DMCA–the post DMCA era

Following the enactment of the DMCA, caselaw quickly began to erode the protections of § 512's safe harbors. A brief of some of the cases has been discussed below.

A.3.1. The Napster litigation

In *Napster,*[33] the Ninth Circuit put the question of liability ahead of safe harbor defense consideration in forestalling protection.

Napster owned proprietary "Music Share" software, which it made freely available for Internet users to download. Users could share MP3 music files[34] with others logged onto the Napster system. Napster allows users to locate and directly exchange MP3 files stored on others' hard drives without paying a fee.[35] The MP3 file is actually transmitted over the Internet directly between requesting and host users, but the connection could not take place without the Napster server.[36]

The Court assumed that Napster is a "service provider"[37] i.e., Napster transmits information without modifying the content. Nevertheless, the Court held, that Napster's role in the transmission of MP3 files was not entitled to § 12(a) protection because such transmission does not occur through Napster's system.[38] In finding vicarious liability likely, despite § 512(m)'s "no affirmative duty to police," the Napster court looked upon the peer-to-peer provider's ability to block access to material, or to otherwise terminate infringing users,

[33] *A & M Records, Inc. v. Napster, Inc., op. cit.* 239 F.3d 1004 (9th Cir. 2001).

[34] MP3 technology allows for the fast and efficient conversion of compact disc recordings into computer files that may be downloaded over the Internet.

[35] See *A & M Records, Inc. v. Napster, Inc., op. cit.* 33.

[36] Id. Napster provides a directory and index of MP3 files that users who are logged on wish to share, but does not store any of the MP3 files on its servers. When the requesting user clicks on the name of an MP3 file listed in Napster's directory, the Napster server routes the request to the "host" user's browser. The host user's browser responds that it either can or cannot supply the file. If the host user can supply the file, the Napster server communicates the host's Internet Protocol (IP) address and routing information to the requesting user's browser.

[37] Under the broader definition of § 512(k)(1)(A).

[38] § 512(a) is applicable only to service providers "transmitting, routing or providing connections for, material through a system or network controlled or operated by or for the service provider." 17 U.S.C.A. § 512(a). See Salow: Liability immunity for internet service providers... *op. cit.* 11.

as evidence that it had the right and ability, and ultimately, the responsibility, to control the infringement.[39]

A.3.2. ALS Scan v. RemarQ communities

In this case,[40] users of the ISP RemarQ posted and accessed newsgroup listings containing hundreds of infringing copies of pornographic photos owned by copyright holder ALS Scan.[41] Technically, ALS Scan failed to comply with § 512(c) notice and did not specify the "identity of the pictures forming the basis of the copyright claim."[42] Rather, the court based liability on the mere provision of what it considered information sufficient to locate infringing content, reasoning that the safe harbor immunities are "not presumptive, but granted only to 'innocent' service providers who can prove that they do not have actual or constructive notice."[43]

[39] Napster, 239 F.3d 1027. "Napster may be vicariously liable when it fails to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index ... Napster ... also bears the burden of policing the system within the limits of the system." The Ninth Circuit grounded its vicarious liability analysis of Napster's services by analogy to the Fonovisa swap-meet, in which the ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise and direct financial benefit adheres where the availability of infringing material acts as a "draw" for customers. Napster, 239 F.3d 1023 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996))

[40] *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (2001). This was the first case where the U.S. Court of Appeals for the Fourth Circuit decided interpreting Title II.

[41] *Ibid.* 620–621.

[42] See Bretan: Harboring doubts about the efficacy of § 512 immunity under the DMCA. *op. cit.* 55.

[43] *ALS Scan, Inc. v. RemarQ Communities, op. cit.* 625. In holding that the copyright owner need not identify infringing content with specificity, ALS Scan suggests ISPs may shoulder a much greater burden than originally contemplated in § 512. See generally Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12B.04[B][[4] [discussing notification procedures and the Fourth Circuit's departure in ALS Scan from strict adherence to the statutory requirements under § 512(c)].

Although this provision requires a copyright owner to give the ISP a detailed notice of infringement, the copyright holder must only provide information that is "reasonably sufficient" to permit the service provider to locate the allegedly infringing material. The court correctly noted that the DMCA requires only "substantial" compliance with § 512(c)'s notice requirements. 43 Since ALS Scan's letter referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan's models and obtain ALS Scan's copyright information, and virtually all photographs on the web sites identified in the letter were infringing, the letter "substantially complied" with the DMCA. Thus, RemarQ was not entitled to a safe harbor defense.

A.3.3. The Ellison case

In this case, a noted science fiction writer brought copyright infringement claims against AOL.[44] AOL's participation in the Usenet network was functionally identical to RemarQ's activities in ALS Scan except that AOL retained Usenet messages with binary content[45] on its servers for 'approximately fourteen days.'[46] The court, characterized AOL's participation as a peer in the Usenet message-forwarding system as 'transitory digital network communications' entitled to safe harbor under § 512(a).[47] Doing so, the court concluded that the threshold requirements of § 512(k)(1)(A) limiting eligibility for § 512(a) safe harbor to 'entities offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received' merely restated the substantive provisions of § 512(a), allowing it to bypass an extensive discussion of AOL's status as a § 512(k)(1)(A) service provider.[48] The court found that AOL's participation as a peer in Usenet met all the elements of the § 512(a) safe harbor.[49]

[44] *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1054–55 (C.D. Cal. 2002).

[45] Binary content includes graphics files, audio files, motion picture files, and compiled computer programs, among other categories. Many Usenet peer servers retain messages with binary content for shorter periods of time than text messages because they occupy more storage space on the server. See Evans, E.: From the cluetrain to the panopticon: ISP activity characterization and control of internet communications. *Michigan Telecommunications and Technology Law Review*, 11 (2004) 445.

[46] *Ellison v. Robertson*, *op. cit.* 1054.

[47] *Ibid.* 1067–1068.

[48] See *ibid.* 1068.

[49] The court rejected Ellison's claim that the automated filtering rules that AOL had applied--it is the rare ISP that carries every single Usenet newsgroup, and AOL certainly did not--constituted 'selection of the material' under § 512(a)(2). See id. 1071 (holding that service provider's selection of newsgroups to carry does not qualify as selection of material under § 512(a)(2)). The court reasoned that if automatic filtering barred ISPs from the § 512(a) safe harbor, ISPs would be forced either to abandon their filtering practices–and therefore carry newsgroups for which there was no end user demand as well as newsgroups devoted to criminal practices like child pornography and prostitution–or abandon their § 512(a) liability protection noting that economic and police power interests support interpretation of § 512(a) that allows ISPs to engage in automated selection of Usenet traffic for forwarding). See Evans: From the cluetrain to the panopticon... *op. cit.* 486.

B. The Australian situation

Not surprisingly, the case law and clarity of ISP liability for subscriber copyright infringements is less developed in Australia than in the United States. But it can be said that Australia is the only country other than the United States which through various amendments like the *Copyright Amendment (Digital Agenda) Act 2000*[50] and Australia-*United States Free Trade Agreement,*[51] there are now clear guidelines for liability of ISPs in Australia.

B.1. Pre digital agenda law situation: The legacy of Telstra v. APRA-strict liability?

The position in Australia cannot be answered without reference to the case of Telstra Corp. Ltd. v. Australasian Performing Right Ass'n. Ltd.[52] Although this case does not involve ISPs, the decision holds much significance for them.

An ISP may be subject to strict liability for any copyright infringement committed by its customers even though it had no way of knowing such an infringement had occurred and no chance of preventing it from happening. This is the legacy of the decision by the High Court in *Telstra* case.

The case involved music, in which APRA owned copyright, played to persons 'on hold' on the telephone.[53] When the caller who was put on hold used a conventional phone, the High Court held by majority that Telstra had infringed APRA's right to cause the works to be transmitted to the subscribers by a diffusion service.[54]

[50] Copyright Amendment (Digital Agenda) Act, 2000. The Act received Royal Assent on 4 September 2000 and came into force on 4 March 2001. [Hereinafter Referred to as 'CADA'.]

[51] The enabling legislation for the AUSFTA, the U.S. Free Trade Agreement Implementation Act 2004 (Cth), was passed by the Australian Parliament on 13 August 2004 and received Royal Assent on 16 August 2004. The U.S. President, George W. Bush, signed the countervailing legislation, the United States–Australia Free Trade Agreement Implementation Act on 3 August 2004. [Hereinafter referred to as 'AUSFTA'].

[52] *Intellectual Property Rights,* 38 (1997) 294.

[53] Telstra participated in the provision of music on hold in three ways: (1) when a person called a Telstra service centre and was put on hold, s/he was played music; (2) Telstra provided the transmission facilities for other businesses to play music to callers who were on hold; and (3) a person who called a subscriber to the "CustomNet" service heard music if the line was busy. See Paynter, H.–Foreman, R.: Liability of Internet Service Providers for Copyright Infringement. *University of NewSouth Wales Law Journal,* 4 (1998) 61.

[54] The 'diffusion right'; Copyright Act 1968 (Cth), § 31(1)(a)(v). Conversely, when the caller used a mobile phone, the High Court unanimously held that Telstra had infringed

Subsequent to this case, APRA based its claim against ISPs on this right. The majority stated that in order to come under the purview of the diffusion right, three elements must be satisfied:

There must be a diffusion service.[55] The majority held that the unwanted music transferred over telephone lines constituted such a service.

The work must be transmitted to the subscribers of the service. In Telstra, the subscribers to the telephone service were deemed to be subscribers to the diffusion service, because clients who used the telephone service were placed on hold and could receive the music transmission.[56]

The alleged infringer must cause the transmission of the allegedly infringed material. In Telstra, the person operating the service is deemed to be the "person causing work to be transmitted.[57] The person who undertakes to provide the service to subscribers in agreements with them," is taken to be "the person operating the service."[58]

Therefore, all three elements were satisfied, and the court held Telstra liable for the infringement.

B.2. The Copyright Amendment (Digital Agenda) Act 2000–A new beginning

In a bid to address the challenges posed to Australian Copyright law by emerging digital technologies, the Australian government passed the Copyright *Amendment (Digital Agenda) Act* 2000 (Cth), amending the Copyright Act.[59]

The Act implements major reforms to the Act in order to update Australia's copyright regime to take into account the rapid development of new technologies.[60]

APRA's right to broadcast the works. The `broadcast right'; Copyright Act 1968 (Cth), § 31(1)(a)(iv). See Telstra, 38 IPR 294, 304, 316, 340.

[55] § 26(1) provides a diffusion involves "the transmission of the work or other subject matter in the course of a service of distributing broadcast or other matter ... over wires, or other paths provided by a material substance."

[56] Telstra, *Intellectual Property Rights*, 303.

[57] Copyright Act 1968 (Cth), § 26(2).

[58] *Ibid.* § 26(4).

[59] It received royal assent on September 4, 2000, and became applicable as of March 4, 2001.

[60] According to the Australian government's commentary on an exposure draft of the Digital Agenda Act, "the central aim of the reforms introduced by that Act was to ensure that Copyright law continued to promote creative endeavor while allowing reasonable access to Copyright material through the Internet and new communications technology." See Middleton, G.: Australia: Intellectual Property–Copyright: Case Comment. *Computer and Telecommunications Law Review*, 12 (2006) 2.

B.2.1. Right of communication to public

The Act defines communicate as to "make available online or electronically transmit a work or other subject-matter."[61] The functions of the broadcasters, cable operators, and ISPs have come under the new right to communicate.

B.2.2. Limitation in liability of ISPs

One of the important aims of the CADA is to limit the liability of ISPs for copyright infringements committed by third parties whilst using their facilities. In determining this, the court after the passing of this Act looks at

- Whether the ISP had the power to prevent the infringement;
- The nature of any relationship between the ISP and the infringer; and
- Whether the ISP took reasonable steps to prevent infringement.[62]

B.2.3. Exclusion for temporary reproduction

The Act includes exceptions for temporary reproduction or copies of subject matter as part of the technical process of making or receiving a communication.[63] Since numerous temporary copies of copyright material are made in the course of electronically transmitting material, this exception was necessary for the continued growth of the Internet.[64] Further, reproductions made in the course of some caching are excluded from liability.[65]

[61] The Copyright Amendment (Digital Agenda) Act 2000, c. 6, § 10(1), sched. 1 (Austl.) (2000).

[62] See §§ 36(1A) and 101(1A). CADA.

[63] §§ 43(A) and 111(A) of CADA. Prior to the Digital Agenda Act, there was concern among Internet users in Australia that, because browsing the Internet involves the making of temporary copies of materials which are the subject of copyright in the memory of the user's computer, then Internet users could be liable for infringement of the copyright owner's exclusive right to reproduce those materials. To address this concern, the Digital Agenda Act introduced §§ 43A and 111A into the Copyright Act, which provide that a person does not infringe copyright in online materials by making a temporary reproduction or adaptation of those materials as part of the technical process of making or receiving a communication, provided that the making of the communication does not itself infringe copyright. See Middleton: Australia: Intellectual Property–Copyright... *op. cit.*

[64] To allow such temporary reproductions, §§ 45 and 94 make an exception to the copyright owner's exclusive right to reproduce material. Moreover, the exception for temporary copies includes the browsing of copyright material online, thus excluding users from liability for browsing. See Mercurio: Internet Service Provider Liability... *op. cit.*

[65] Mia Garlick & Simon Gilchrist, 'The Digital Age: Will Oz Ever Get There' (1999) 3 TeleMedia 6, 79. The general view among legal commentators is that it is unlikely that proxy caching (as opposed to passive or automatic caching) is covered by the temporary reproductions exceptions in §§ 43A and 111A of the Copyright Act, as reproductions of

B.3. Post digital agenda period

The provisions in the digital agenda amendment were not complete to perfectly define the liability of ISP due to which further amendments were introduced which brought the Australian Laws in abreast with that of international standards.

B.3.1. The AUSFTA Amendments

Extensive changes to copyright law have been introduced by the AUSFTA[66] It introduced new provisions which limit the remedies a court may award for infringement of copyright by an ISP, subject to certain conditions. An ISP may be liable for copyright infringement in relation to something it does itself, and for authorising infringements by people who use its facilities or service.

B.3.1.1. The Safe Harbour Provisions

The amendments do not affect whether or not an ISP is liable for infringement, but rather the consequences of that liability. The categories of online activities in §§ 116AC to 116AF of the Copyright Act to which the limitation on remedies under § 116AG apply are similar to the four "safe harbours" of the U.S. DMCA, and are as follows:

Category A: providing facilities for transmitting, routing or providing connections;[67]

Category B: caching by automatic process;[68]

Category C: storing material on a ISP system at the direction of a user;[69] and

Category D: referring users to an online location.[70]

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copyright materials made in the course of proxy caching are arguably not temporary, and are not made as part of the technical process of making or receiving a communication. See Middleton: Australia: Intellectual Property–Copyright... *op. cit.*

[66] Art. 17.11.29 of Chapter 17 of the AUSFTA deals with limitations on liability for "service providers", including providers or operators of facilities for online services or network access such as ISPs. Schedule 9 Part 11 of the AUSFTA implements this Article by inserting new Division 2AA of Part V into the Copyright Act.

[67] § 116AC. It reads as "A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections."

[68] § 116AD. It reads as "A carriage service provider carries out a Category B activity by caching copyright material through an automatic process. The carriage service provider must not manually select the copyright material for caching."

[69] § 116 AE. It reads as "A carriage service provider carries out a Category C activity by storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider."

B.3.1.2. Conditions on Limitation of Remedies

In relation to all categories of activities the ISP must provide for termination of accounts of the repeat infringers.[71] In addition, if there is a relevant industry code in force, the ISP must comply with the relevant provisions of that code. The conditions that must be satisfied for ISPs to enjoy limited liability become more stringent for each category from Category A to Category D. The main provision for limitation under Category A activity is that the transmission must have been initiated by a person other than the ISP while the main conditions for Category C and Category D activity is that ISPs do not receive a financial benefit directly attributable to the infringing activity and expeditiously remove or disable access to material residing on its network or systems when they obtain actual knowledge of copyright infringement.[72]

B.3.2. The expanding nature of copyright liability through recent court decisions

In two recent groundbreaking decisions, the Federal Court of Australia considered the liability of intermediaries for online acts of copyright infringement perpetrated by others by authorising those infringing acts.

B.3.2.1. The Cooper Case: Liability for linking

In the landmark judgment of *Universal Music v Cooper,*[73] the Federal Court has held that a person who provides hyperlinks to online material provided by other persons which infringes copyright may be secondarily liable for that copyright infringement.

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[70] § 116AF. It reads as "A carriage service provider carries out a Category D activity by referring users to an online location using information location tools or technology."

[71] § 116AH lays down the table for conditions for each category of activities.

[72] This may be achieved through a notices regime whereby the ISP reacts to effective notices of infringement issued by copyright holders, taking down alleged infringing material, as well as effective counter-notifications by those whose material is the subject of the notice, restoring alleged infringing material. § 116 AI provides that If the ISP, in an action relating to this Division, points to evidence, as prescribed, that suggests that the ISP has complied with a condition, the court must presume, in the absence of evidence to the contrary, that the ISP has complied with the condition.

[73] [2005] F.C.A. 972. This case represents the first time in Australia that the recording industry has accused an ISP of direct involvement in music piracy by allowing its infrastructure to be used for file-trading activities. See Hyland, M.: The ever-expanding nature of Copyright Liability down under. Communications Law, 10 (2005) 157–163, 2005 WL 3752722 (UK).

Stephen Cooper operated a website which contained hyperlinks to hundreds of MP3 music files stored on remote websites operated by others that could be automatically downloaded free of charge by visitors to Cooper's website by clicking on those hyperlinks. Cooper permitted visitors to his website to create new hyperlinks also.

Universal Music and numerous other copyright owners commenced proceedings against Cooper and Com-Cen for authorising infringement of their copyright in the musical recordings contained in the infringing MP3 files to which Cooper's site linked.[74]

Com-Cen was held liable for authorising the infringing acts which took place via Cooper's website. The Court noted that the *safe harbour* provisions introduced by the AUSFTA amendments were not in force at the relevant time and do not apply retrospectively.[75]

B.3.2.2 The Kazaa Case: Peer to Peer (P2P) file sharing

In *Universal Music Australia Pty Ltd v Sharman License Holdings,*[76] the Federal Court considered for the first time in Australia the liability of providers of

[74] E-Talk Communications Pty Ltd trading as Com-Cen Internet Services ("Com-Cen") hosted Cooper's website free of charge in exchange for Cooper displaying the "Com-Cen" logo on his website, and provided Cooper with assistance with respect to the establishment and operation of his website. Id.

[75] Even if the safe harbour provisions had been in force, the ISP could not have relied on them because it received a financial benefit from the infringements in the form of free advertising on the website, the ISP used to receive financial benefit and because it failed to take action against the website proprietor despite knowing that infringements were taking place. Although Com-Cen denied having knowledge of the content of Cooper's website, the court found that this was unlikely, as the free hosting arrangement which Com-Cen had negotiated with Cooper was likely to be based on the fact that Com-Cen believed it was a high-traffic website, and would therefore provide valuable advertising exposure. Further, it is likely that Com-Cen would have visited Cooper's website to ensure that Cooper had added the Com-Cen logo to his website, as agreed. Com-Cen did not take steps to prevent the infringing acts by refusing to host Cooper's website, which was a reasonable step that it could have taken to prevent or avoid the infringing acts. See Williams, Micheals: "An overview of the current legal framework and predictions about the future of online liability in Australia"; Accessed from http://www.copyright.asn.au/pdf/powerpoint/f07n01williams-ppt.pdf

[76] [2005] F.C.A. 1242. In the decision delivered on 5 September 2005, the Federal Court held that Sharman Networks Ltd.which controlled had authorized infringement of copyright by users of its file-sharing software. See Baulch, Libby: "Major Copyright Reforms and software IPR protection in Australia" Accessed from http://www.copyright.org.au/pdf/acc/articles_pdf/a06n17.pdf

peer-to-peer files-sharing networks for copyright infringements perpetrated by users of their networks.

The applicants brought an action against Sharman Networks Limited, which controlled the Kazaa peer to peer file sharing system, facilitated by the Kazaa Media Desktop (KMD)software program which users could download free of charge from the Kazaa website. Kazaa generated revenue from streaming advertising to users of the KMD. Users of the KMD could access "blue files", which are not subject to any arrangement with the copyright holders in those files, and "gold files", which are licensed files made available by arrangement with the relevant copyright owners..[77]

The ISP was held liable for Copyright Infringement. Wilcox J emphasized that a number of factors supported this finding. First, the court held that respondents had long known that the Kazaa system was widely used for the sharing of copyright files, and that the measures that they had adopted were "ineffective to prevent copyright infringements by users." Second, the respondents had failed to take technical measures that would curtail the sharing of copyright files.[78]

[77] The Kazaa website contained notices on each page that the respondents did not condone activities that infringe copyright. Kazaa users also had to enter into a browse-wrap end-user licence agreement which made it a condition of use of the KMD that users agreed not to use the software to infringe the intellectual property rights of others, and warning users of their potential liability if they infringed copyright or other intellectual property rights of others. However, the Kazaa website also linked to a website headed "Join the Revolution", which criticized the opposition of record and movie companies to peer-to-peer networks, and encouraged the use of peer-to-peer applications as being beneficial to everyone by providing lower prices, unlimited catalogues "and more". See Middleton: Australia: Intellectual Property–Copyright... *op. cit.*

[78] *Ibid.* The Court observed: "It is in the respondents' financial interest to maximize, not to minimize, music file–sharing." Also Wilcox J further observed that "far from taking steps that are likely effectively to curtail copyright file–sharing, Sharman Networks and Altnet have included on the Kazaa Web site exhortations to users to increase their file–sharing and a Web page headed 'Join the Revolution' that criticizes record companies for opposing peer-to-peer file–sharing." He further noted that this Web campaign would "encourage visitors to think it 'cool' to defy the record companies by ignoring copyright constraints." The Court also ordered that the Kazaa Internet file–sharing system could continue to operate but only if within two months it was modified to include technology to prevent copyright infringement.

As a result of the decision, there is a concern that the burden of enforcement may be shifted away from the rights holder and onto unrelated third parties such as ISPs.[79]

Kaaza appealed against this decision but, on 27 July 2006, the parties announced that the action had been settled.[80]

C. The European approach

The European approach towards ISP liability is primarily dealt with two Directives i.e., the *EU Copyright Directive*[81] and the *e-commerce Directive*, which already has been implemented by a number of European Countries as part of their national legislation. Although EU directives do not have the force of law in EU member countries, they do require EU member countries to amend their own laws to the extent necessary to conform to the Directives' intended results.[82]

C.1. The copyright directive

This Directive sets out certain limitation on the liability of ISPs. Article 5(1) provides for an exception from liability for copyright infringement, where the reproduction is transient or incidental when the transient copies are an integral and essential part of a technological process whose sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or other subject-matter to be made; *and* they have no independent economic significance. The net effect of this is that ISP's will not be required

[79] *Ibid.* The court ordered that the respondents could continue to operate the Kazaa network without liability for authorization infringement if they implemented a mandatory keyword filtering system in all new versions of the KMD, and imposed maximum pressure on existing Kazaa users to upgrade their existing KMD software to a version which included the keyword filtering system by the use of dialogue boxes which could not closed until the user upgraded.

[80] The settlement also applied to legal actions relating to Kazaa in the US. The settlement agreement includes an undertaking by the Kazaa operators to introduce filtering technology to block access to infringing music files.

[81] Directive 2001/29/EC of the European Parliament and of the Counsel of May 22, 2001 on the harmonization of certain aspects of Copyright and related rights in the information society.

[82] Scherzer, H.: European Copyright Directives Ushers in Era of Harmony, Change. (2001) 226 *New York Law Journal*, 113 (2001) 73.

to seek consent, or to pay for transient copies made across their networks as part of the transmission process.

Additionally, the EU Copyright Directives offers numerous optional exemptions that member countries may enact so as to limit ISP liability under their own laws.[83]

C.2. The EU E-Commerce Directive

The EU E-Commerce Directive offers insight into the willingness of EU member countries to address the liabilities of ISPs as "service providers" of "information society services",[84] applies to ISPs established within the European Union.[85] The key areas of the directive relating to ISP liability are .the *'mere conduit'* exception provision, which provides that ISP's are not liable for information transmitted on their networks provided they do not initiate the transmission, do not select the receivers of the transmission, and do not select or modify the information in the transmission,[86] *Caching* provision, where ISP will not be held liable for the automatic, intermediate, and temporary storage of information that is carried out for the sole purpose of

[83] Ch. II Art 5, 2–5 of the Directive. Although the EU Copyright Directive does not contain any provision in favour of copyright owners that is similar to the notice and take-down procedure in the DMCA, it requires EU member states to provide and apply "effective, proportionate and dissuasive" sanctions and remedies for copyright holders in the infringement context. See Ch. IV, Art. 8, 1 of the Directive.

[84] Directive 2000/31/EC of the European Union and of the counsel of June 8, 2000 on certain legal aspects of informations society services, in particular electronic commerce, in the internal market. ("Directive on Electronic Commerce") ("EU E-Commerce Directive"). Under this directive intermediaries are referred s "Information Society Services". It is defined as "Any service normally provided for remuneration, at a distance, by electronic means and at the individual's request of a recipient of a service". This definition is drafted in such a way as to include a wide range of intermediaries including content providers and traditional Internet Service Providers.

[85] Fancher, C.–Dunn, G. H.: The Trend towards limited internet service provider (ISP) liability for third party copyright infringement in the internet: A United States and global perspective. *Business Law International*, 4 (2002) 152.

[86] Art 12 of the Directive. Those on-line intermediaries found to meet these three conditions are considered mere conduits, and will not be held responsible for illegal information put on the network by third parties. In other words, in so far as on-line intermediaries fulfill the necessary conditions to be qualified as mere conduits, the standard of liability is "no liability". See Julia-Barcelo, R.: On-line intermediary liability issues: comparing E.U. and U.S. legal frameworks. European Intellectual Property Review, 22 (2000) 105–119, 109.

making the onward transmission of the information more efficient;[87] *Hosting* provision, where ISPs which provide storage space on web servers to third-party users, an act known as "hosting", benefit from a limitation of their liability for acts related to such storage.[88]

D. The Asian viewpoint

D.1. Singapore:Leading the Asian provisions

Singapore has enacted various legislations dealing with ISP liability from time to time. The Singapore Electronic Transactions Act, 1998 and U.S. Singapore Free Trade Agreement[89] are a step ahead in this regard.

D.1.1. Singapore's Electronic Transactions Act 1998

In 1998 the Singapore Parliament adopted very clear measures aimed at insulating ISP's from both civil and criminal liability under § 10 of the Electronic Transactions Act 1998. This provision provides that an ISP shall not be subject to any civil or criminal liability in the form of electronic records to which that ISP merely provides access.[90]This immunity is granted only if the liability is founded on the making, publication, dissemination or distribution of such materials or any statement made in such material[91] or the infringement of any rights subsisting in or in relation to such material.[92] The importance of this

[87] Art 13 of the Directive provides that this immunity applies where the ISP does not modify the cached information, complies with access conditions in relation to the information, complies with any rules in respect of updating the information and does not interfere with the lawful use of technology with the intention of obtaining data on the use of the cached content. Art 13 of the Directive. See Sutter, Gavin; "FE/HE Institutions and Liability for Third Party Provided Content"; Accessed from http://www.jisclegal.ac.uk/publications/thirdpartycontent.htm

[88] See Art. 14 of the Directive. An ISP will not be liable for hosting information, provided they do not have actual knowledge that the activity is illegal and, upon obtaining such knowledge, act quickly to remove it.

[89] Hereinafter referred to as 'USSFTA'.

[90] § 10(1). For the purposes of this section–"provides access", in relation to third-party material, means the provision of the necessary technical means by which third-party material may be accessed and includes the automatic and temporary storage of the third-party material for the purpose of providing access; "third-party", in relation to a network service provider, means a person over whom the provider has no effective control.

[91] § 10(1) (a).

[92] § 10(1) (b). This exemption from liability is potentially very powerful. It is not even conditional upon lack of knowledge on the part of the service provider. Hence it will apply

piece of legislation cannot be overstated, because prior to 1998 the prospect of ISP liability under the laws of Singapore was a real one, even for those ISP's that took no measures at all to patrol traffic on their systems.

D.1.2. The Singapore Copyright (amendment) Act 1999

This amendment[93] provided that when the ISP makes an electronic copy of the copyright material available on the network, it cannot be liable for infringement if it is made available in the course of providing connections to the copy, in the storage, transmission, routing, or provision of connections is done at the direction of a user of the network without any deliberate modification of its contents by the ISP.[94]

D.1.3. U.S. Singapore Free Trade Agreement

The USSFTA Implementation Act was implemented by both countries on January 1, 2004.[95] This agreement provides for limited liability for ISPs, reflecting the balance struck in the U.S. DMCA between legitimate ISP activity and the infringement of copyrights.[96] The courts will be precluded from granting monetary relief for any copyright infringement by ISPs in the course of hosting

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even if a service provider knows that a certain web-site has a lot of unlicensed, pirated software for download, and that many of the service provider's subscribers access that "warez" web-site.

[93] In Singapore, the Registry of Trade Marks and Patents formed an Electronic Commerce Committee in 1998 to comprehensively study the issues involved and provide suggestions for dealing with these issues. In later part of 1999, the Singapore Parliament incorporated these suggestions in a Bill and enacted the Copyright (Amendment) Bill 1999 incorporating it into the Copyright Act.

[94] § 193C(1). However, if the copyright owner provides an ISP with a statutory declaration expressing his belief of the occurrence of a copyright infringement, then it is not exempt from liability for making the material available on the network under § 193C(1) of the Copyright (Amendment) Act. This declaration from the copyright owner must outline the reasons underlying the copyright owner's allegations of copyright infringement. The ISP on receiving such notice has the responsibility of removing the copy from the network or disabling access to the material on the network. If the ISP fails to do this in a reasonable time, the Network Service Provider is liable.

[95] The US-Singapore Free Trade Agreement was signed May 6, 2003 and ratified by the US House of Representatives on July 24, 2003 by a vote of 272–155. The US Senate ratified the bill on July 31, 2003 by a vote of 66–32. President George W. Bush signed into law the United States-Singapore Free Trade Agreement Implementation Act on September 3, 2003.

[96] See Report for Congress on US-Singapore Free Trade Agreement; Accessed from http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5582:1

and transmitting material. However, this immunity applies only if ISPs comply with certain administrative requirements such as the taking down of infringing content once they have been notified by the copyright owner in writing, and the putting back of that same content on counter-notice by the website owner.

D.2. The Indian stand

The Copyright Act, 1957 was obviously drafted in complete oblivion of the phenomenon called the Internet. Even after its amendments in 1994 and 1999 it does not contain any express provision for determining or limiting ISP liability.

D.2.1. ISP Liability Under Information Technology Act, 2000

The provisions relating to the ISPs are specifically legislated in the IT Act, 2000 where an ISP is referred to as Network service provider and Explanation (a) to § 79 defines it as: "Network service provider" means an intermediary.[97] This provision exempts ISPs from liability if they can prove that they had no knowledge of the occurrence of the alleged act, and that they had taken due diligence to prevent a violation.[98] The liability of ISPs could arise in a number of ways under different statutes. The liability could be criminal or civil in nature depending on various factors.[99] The idea is that the liability of an ISP for his action or omission be first determined in accordance with the statute under

[97] Intermediary has been defined under § 2(w) as: "intermediary" with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

[98] See Information Technology Act 2000 § 79. However, the existing provision does not clearly prescribe liability limits of service providers. For example, if a person makes a representation to a service provider claiming copyright on the material available on the network, will the service provider be liable if he fails to take steps within a reasonable time to remove the infringing material from the network? If the service provider fails to prevent infringement of copyright in the above circumstances, is the plea of not having knowledge of infringement still available to him? If the service provider removes the material from the network in pursuance to the representation made by a person which later on proves false, will the service provider be liable to the person whose material has been removed?

[99] It is impractical to define the liability of ISPs which could arise in various forms at one place. Equally impractical could be to amend all our laws, which could hold ISPs liable, in order to limit their liability. The latter has not been attempted in any of the Indian legislations including the Copyright Act, 1957 till now. The IT Act, 2000 does not attempt the former but just seeks to create a filtering mechanism for determining the liability of ISPs.

which it arises and then if at all the ISP is held liable, his liability again be filtered through § 79 of the IT Act.[100]

IV. Proposal for international standard guidelines and conclusion

As courts and legislators continue to mold ISP liability standards, it is crucial that developments in substantive copyright law amendments occur alongside international agreement to create and adopt standardized procedures so that copyright holders, ISPs, and alleged infringers can easily follow where copyright infringement occurs on an international scale.

This expansive growth of internet demands creation of a viable framework of international procedural standards that equip copyright holders and alleged infringers with a practicable means of contacting one another and resolving conflicts on a temporary interim basis.

If the U.S.'s recent legislative effort, the DMCA, is any indication of how other countries will treat ISP copyright liability for third-party infringement, then copyright will be limited by broad substantive legal exemptions for ISPs, leaving them with potentially divergent procedural standards to follow in jurisdictions where they are forced to guard their copyrights.[101]

Designing an international notice/take-down standard requires consideration of the sovereignty of any given country's individual substantive copyright law. While it is impractical to include every potential caveat of individual laws in each country, it is feasible to generate a set of procedural guidelines applicable to all. Having examined both case law and legislative efforts in the U.S. and abroad, four viable behavioral elements appear to be essential: 1) designation of an agent to receive notice of infringement, 2) presumption of jurisdiction over the matter in the state where the ISP resides and accepts notice, but not necessarily in the jurisdiction where the copyright owner resides, 3) expeditious take-down pending formal resolution by a judicial body, and, 4) reasonable restoration of material or access to material where legitimate counter notification is presented to the ISP.

WIPO as a guardian and promoter of international property rights to implement international notice and take-down policy guidelines. WIPO is suitable to

[100] An illustration of this can be of a situation where an ISP is accused of illegally distributing pirated copies of music, then his liability be first determined under § 51(a)(ii) and § 63 of the Copyright Act, 1957. If the ISP is found liable then his liability again be tested on the touchstone of § 79 of the IT Act, 2000.

[101] See Soma–Norman: International take-down policy... *op. cit.*

address the complex issues that raise when copyright infringement spans international borders. Further support for WIPO stems from its position on multijurisdictional conflicts.

Another appropropriate international organization for implementing international take down standards of conduct in copyright infringement claims could be the World Trade Organization[102] It creates no new substantive rights, but seeks only to enforce compliance with existing substantive rights of member countries. Without having to interpret or select the law applicable to any given copyright infringement claim that occurs on an international basis, the WTO can effectively implement procedural guidelines to at minimum place parties to any controversy in a position where they can take the next step of litigating the matter. This relieves the WTO from making any jurisdictional determinations, or concluding which party should prevail.

International standards for copyright protection must occur in the spirit of freely disseminating information and encouraging the broadest communication possible. International procedural guidelines implemented by the WTO and WIPO would strike a balance between the interests of copyright holders, ISPs, and alleged infringers without having to overcome the impracticable burden of creating uniform, substantive global copyrights.

The internet is the future and ISPs are the gateway. Let the world come together and protect it from being dragged into gratuitous litigations.

[102] The World Trade Organization (Hereinafter referred to as 'WTO') is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. The World Trade Organization was created as part of the General Agreement on Tariffs and Trade (GATT) revision signed April 15, 1994. As part of the 1994 revision of the GATT, the Agreement on Trade-Related Aspects of Intellectual Property Rights,), established the WTO and created an enforcement structure to safeguard international intellectual property rights. See Soma–Norman: International take-down policy... *op. cit.*

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Personal Status and Social Structure in Early Medieval Bavaria

Abstract. The social structure of the 8th c. Bavaria reveals a highly dynamic picture: by the age of the last two ruling dukes of the Agilolfing dynasty, Odilo and Tassilo III, a system of personal statuses had crystallised that can be reconstructed from legal sources and charters, on the one hand; and the development of Bavarian nobility and the manifestation of this process in legislation can be dated to this period, on the other. After outlining the political/historical background (I.); this paper intends to give an in-depth investigation of this issue: following comments on the concept of *libertas*, the legal status of freemen *(liberi)* and servants *(servi)* will be looked at in the mirror of *Lex Baiuvariorum* (II); then, the relation between the duke and ancient Bavarian *genealogiae*, the development of the layer of the *adalscalhae*, the birth of the Bavarian order of nobles and its appearance in the resolutions of the Council of Dingolfing, and the issue of Bavarian counties prior to the Carolingians seizing power will be exposed relying on legal and literary sources (III).

Keywords: Lex Baiuvariorum, libertas, early-medieval legal sources

I. With duke Hucbert the male line of the Agilolfing rulers reigning over Bavaria had terminated, and after his death Odilo from the Alemannian branch of the Agilolfing dynasty, son of the Alemannian duke, Gottfried ascended the Bavarian throne.[1] Having become the ruling duke of Alemannia around 680,

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[1] E. Zöllner: Die Herkunft der Agilolfinger. In: Bosl, K. (ed.): *Zur Geschichte der Bayern.* Darmstadt, 1965. 127 sqq.; Jarnut, J.: Untersuchungen zu den fränkisch-alemannischen Beziehungen in der ersten Hälfte des 8. Jahrhunderts. *Schweizerische Zeitschrift für Geschichte* 30 (1980) 9 sqq.; Reindel, K.: Salzburg und die Agilolfinger. In: H. Dopsch–R. Juffinger (Hrsg.): *Virgil von Salzburg. Missionar und Gelehrter.* Salzburg, 1980. 70 sq.; Wolfram, H.: *Die Geburt Mitteleuropas. Geschichte Österreichs vor seiner Entstehung, 378–907.* Wien–Berlin, 1987. 98 sq.; Nótári T.: *Források Salzburg kora középkori történetéből* (Sources from the History of Early-Medieval Salzburg). Szeged, 2005. 44 sqq.;

Gottfried divided his country–like Theodo Bavaria–among his sons into sub-dukedoms, and Odilo had been most probably granted the territories lying south of the Boden See and in the surroundings of Augsburg, which helped Pirmin to found the monastery in Pfungen with Odilo's support.[2] After their father's death, Odilo was ousted by his brother, Willihari from the territory, and probably Pirmin was forced to leave his monastery for the same reason. Between 709 and 712 the maior domus, Pippin II attacked Willihari several times, which was part of the intervention of the Franks in response to the conflict between the Bavarian and Alemannian branches of the Agilolfings, but in the course of this the *maior domus* did not contest the Agilolfing dynasty's demand for ruling over the Alemannian and Bavarian Dukedom. However, he definitely had a say in deciding who was to be raised to duked[illegible]m–through this act they considerably enhanced their power, which they could legitimise only after the uprising of Pippin III.[3] Odilo was able to take the duke's throne of Bavaria in 736.[4] Yet from the initial period of his reign between 736 and 739–the establishment of bishoprics by Bonifatius–only a charter on the founding of the church sanctified by bishop Vivilo in the honour of Virgin Mary has been left to us. No traces of the duke's contribution in the establishment of this monastery can be identified though. Reference to the duke in this charter is rather unique, and shows somewhat remote–perhaps opposition–approach to him,[5] which seems to be supported by the fact that a few years later a group of the Bavarian nobility appeared to be strong and resolute enough to expel the duke of Alemannian origin from Bavaria.[6] The opposition to Odilo can be most probably attributed to the Carolingian intervention implemented to further his ascension to the throne–just as earlier in the era of duke Hucbert, and later to reinforce the position of Odilo's son, Tassilo[7]–since the *Annales Mettenses*

Nótári T.: *A salzburgi historiográfia kezdetei* (The Beginning of Historiography in Salzburg). Szeged, 2007. 180 sqq.

[2] Zöllner: *op. cit.* 128 sq.; Störmer, W.: Adelsgruppen im früh- und hochmittelalterlichen Bayern. *Studien zur bayerischen Verfassungs- und Sozialgeschichte 4.* München, 1972. 23 sq.

[3] Jahn, J.: *Ducatus Baiuvariorum. Das bairische Herzogtum der Agilolfinger.* Stuttgart, 1991. 124.

[4] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 98.

[5] *Traditio Pataviensis* Nr. 2. *Quellen und Erörterungen zur bayerischen und deutschen Geschichte* (1930) Nr. 2. *In tempore duci Paiauuariorum erat nomen eius, et annum unum fuit patria ista in sua potestate.*

[6] *Breves Notitiae* 8, 1, Lošek, F. (ed.): Mitteilungen der Gesellschaft für Salzburger Landeskunde 130. 1990.

[7] Jahn: *Ducatus Baiuvariorum... op. cit.* 127.

priores claims that Odilo was able to take dukedom owing to the generousness of Charles Martell.[8] At that time Charles Martell's wife was Swanahilt, a kin of Odilo, whom he had brought along from Bavaria in 725 together with Pilitrud. Most probably it was owing to Swanahilt's influence that until Charles Martell's death the Frankish Empire and Bavaria and Alemannia maintained peaceful relations. Over these territories the Frankish ruler extended his influence without the need to integrate them into the Frankish state. Regarding Charles Martell's death in 741, the author of the *Continuationes Fredegarii* note that he had withdrawn the neighbouring *regna* from his control.[9] Nevertheless, the protocol on the division of his country shortly before his death does not mention Bavaria at all[10] because it was allowed to remain an independent province not merged under Frankish supremacy–all the more as *Lex Baiuvariorum* guaranteed the rule over Bavaria to the Agilolfings.[11] It cannot be ruled out though–since Aquitania integrated into the *imperium* was not referred to in the protocol either–that external dukedoms were not mentioned at all during the division of the empire, and, albeit, eastern territories belonged to Carloman's competence, Pippin III quite often intervened in Bavarian affairs as early as during his brother's lifetime.

Taking all the above into account, a consistent and already static conflict between the Agilolfings and the Carolingians cannot be stated, otherwise Odilo could not have fled from the threat of the Bavarian opposition in 740/41 to the Frankish court, and it was only the succession discord among the Carolingians–when Carloman and mainly Pippin infringed the Agolfings' interests several times–that made the relation tenser.[12] From August 740 to March 741, Odilo stayed at the Frankish court after having been expelled by his enemies from Bavaria[13]–of the reasons for the expulsion and the identity of

[8] *Annales Mettenses priores* 33. (*Monumenta Germaniae Historica*, SS rer. Germ. 10. 1905.) ... *ipsum etiam ducatum suum, quod largiente olim Carolo principe habuerat.*

[9] *Continuationes Fredegarii* 21. (*Monumenta Germaniae Historica*, SS 2. 1888.)

[10] *Continuationes Fredegarii* 23.

[11] *Lex Baiuvariorum* 3, 1. (*Monumenta Germaniae Historica*, LL nat. Germ. 5, 2. Hannover, 1926.) *Dux vero, qui preest in populo, ille semper de genere Agilolvingarum fuit et debet esse, quia sic reges antecessores nostri concesserunt eis, qui de genere illorum fidelis rei erat et prudens, ipsum constituebat ducem ad regendum populum illum.* Cf. Wolfram: *Die Geburt Mitteleuropas... op. cit.* 387 sqq.; Störmer: *Adelsgruppen... op. cit.* 14 sqq.; About the *Lex Baiuvariorum* see Landau, P.: *Die Lex Baiuvariorum: Entstehungszeit, Entstehungsort und Charakter von Bayerns ältester Rechts- und Geschichtsquelle.* München, 2004.

[12] Jahn: *Ducatus Baiuvariorum... op. cit.* 130 sq.

[13] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 98 sq.

the enemies nothing is said in the sources. However, it is not unfounded to assume that this firm action taken by the nobles' opposition must have been somehow related, on the one hand, to the approach engaged by Odilo, who ascended the Bavarian throne with the Franks' support, to most probably ignore the demands for power of the nobles who had major influence under the Bavarian Agilolfing branch; and, on the other, to the establishment of bishoprics by Bonifatius, considerably furthered by Charles Martell, and perhaps Pippin and Carloman. Later, the duke was forced to win over this opposition that took firm action by granting them allowances, and that is how Odilo's age could become the period of the evolution of Bavarian nobility.[14] During the last years of his rule, Charles Martell preferred Pippin, who appeared to be a more talented politician, to Carloman senior, and made him his co-ruler,[15] which led to attempts to take counter-action by his wife, Swanahilt and son, Grifo. However, once Grifo–whose succession claim to the eastern territories must have been considered to have good chances by Bonifatius too[16]–and Swanahilt had been ousted from power, the Frankish policy turned to Alemannia and Bavaria with imperialistic demands.[17]

Considering all the above, it is fully clear that Bavaria did not belong to the provinces intended to be divided by Charles Martell among his sons since Bavarian territories belonged neither *de iure*, nor *de facto* to the Carolingians' power, and the Frankish ruler did not want to deprive the Agilolfings of the power they were lawfully entitled to–although Bavaria maintained an alliance with the Frankish Empire, it did not constitute a sub-province or a subjected province thereof.[18] It was during the months spent at the Frankish court that Odilo acquainted with Charles Martell's daughter, Carloman's and Pippin's sister, Hiltrud, and they were engaged–most probably enjoying the support of Swanahilt, kin of Odilo, who desired to make dynastic relations between the Carolingians and the Agilolfings closer through this event too, and having Charles Martell's approval.[19] After Charles Martell's death on 22 October 741, however, Hiltrud had to leave the Frankish court.[20] Odilo returned to Bavaria before Charles Martell's death, and re-obtained his dukedom with the Frankish

[14] Jahn: *Ducatus Baiuvariorum... op. cit.* 173.

[15] *Annales Mettenses priores* 31. *Pippinus iam princeps factus ...*

[16] Bonifatius: *Epistolae* 48. (*Monumenta Germaniae Historica*, EE selectae 1. 1916.)

[17] Strömer: *Adelsgruppen... op. cit.* 38.

[18] Jahn: *Ducatus Baiuvariorum... op. cit.* 174 sqq.

[19] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 98; Becher, M.: Zum Geburtsjahr Tassilos III. *Zeitschrift für bayerische Landesgeschichte* 52 (1989) 9 sqq.

[20] *Annales Mettenses priores* 33; *Continuationes Fredegarii* 25.

assistance, and in this sense it is well founded to deliberate the statement of the *Annales Mettenses priores* asserting that Odilo obtained his dukedom owing to Charles's generosity.[21] In the same year, in 741 Odilo's and Hiltrud's child, Tassilo was born.[22] Pippin and Carloman did not accept Charles Martell's succession ordinance that–upon Swanahilt's influence–granted Grifo share of inheritance from his empire.[23] Sources assert that even Frankish dignitaries were not willing to consent to the decision made on the queen's influence, and with their army Carloman and Pippin prevailed over Grio and his mother, Swanahilt, who were seeking refuge in Laon, exiling the former to the monastery in Chèvremont, the latter to the monastery in Chelles.[24] Pippin and Carloman again divided the empire at Vieux-Poitiers,[25] which raised the number of consecutive divisions to three: Charles Martell's first division was revised by him at Swanahilt's advice; in the second division he ranked Grifo also among beneficiaries; and, then, the divisio by Pippin an Carloman at Vieux-Poitiers followed, which was, however, not generally acknowledged as shown by the uprising in Aquitania.[26]

Pippin's and Carloman's legitimacy seemed all the more questionable because Charles Martell exercised power since 737 also for lack of a legitimate ruler from the Merowing dynasty; and in terms of their rank his sons were not on a higher level either than the Alemannian, Aquitanian or Bavarian dukes, and the oath of allegiance of the latter bound them merely to *fidelitas* to Charles Martell–even Pippin made up for the lack of sacred legitimacy only through being anointed in 751.[27] Therefore, Pippin and Carloman cannot be considered legitimate and his all the more aggressive policy understandably evoked the opposition of the ruling dukes of the territories that were partly integrated in the Frankish Empire, partly lay outside it but belonged to the Frankish sphere of interest. Odilo and Aquitania's duke, Hunoald entered into a protection alliance through legates against the Franks,[28] which was joined by the Saxons and Alemannians too. After Pippin and Carloman defeated Hunoald

[21] *Annales Mettenses priores* 33. ... *ipsum etiam ducatum suum, quod largiente olim Carolo principe habuerat.*

[22] Reindel, K.: *Das Zeitalter der Agilolfinger (bis 788).* In: Spindler, M. (Hrsg.): Handbuch der bayerischen Geschichte I. München, 1971. 124.

[23] Jahn: *Ducatus Baiuvariorum... op. cit.* 177.

[24] *Annales Mettenses priores* 32 sq.

[25] *Annales regni Francorum a.* 742. (*Monumenta Germaniae Historica,* SS rer. Germ. 6. Hannover, 1895.); *Annales Mettenses priores* 33.

[26] *Continuationes Fredegarii* 25; *Annales regni Francorum a.* 742.

[27] Jahn: *Ducatus Baiuvariorum... op. cit.* 179.

[28] *Annales Mettenses priores* 35.

in 742, they turned against the Alemannian duke, Theodbald, Odilo's brother, who had attacked them in the campaign against Aquitania.[29] The Frankish army getting across the Rhine and setting up a camp beside the Danube represented due threat to get the Alemannians to acknowledge Frankish *dicio* over them;[30] and it cannot be ruled out that the Frankish military force penetrated into Bavarian territories too.[31] The dukes opposing Pippin's and Carloman's claims for power found an ally in Grifo and Swanahilt, who had a considerable number of loyal men–with the latter Odilo could maintain fairly good relations through his wife, Hiltrut–and so an opposition covering the whole empire against Charles Martell's sons from his first marriage evolved. In this system of alliance Odilo's prestige can be hardly underestimated since his multiple kinship relations maintained with the Carolingians–established through Swanahilt, on the one hand, and Hiltrud, on the other[32]–could make him a worthy rival of Pippin and Carloman, similarly to the rivalry evolved a generation later between Tassilo and Charlemagne.[33] In addition to the description of the armed conflict between Pippin and Carloman and their brother-in-law, Odilo, ended with the Franks' victory, the sources expounded the reasons for the conflict: Odilo wanted to withdraw his country he had won owing to Charles Martell's generosity from the Carolingians' influence.[34] However, this act cannot be qualified a consistent deed against Frankish authority because in the 740's the Frankish *dicio* cannot be unambiguously considered the synonym of the power exercised by the Carolingians.[35] After the victory by the Franks, no reprisals were taken against Odilo–as stated in sources; keeping his duke's rank he could rule in Bavaria; all the more for he made his position firm and stable among the Bavarian nobles, who engaged an opposition initially, and in 744, perhaps in spite of Pippin's will, Carloman and

[29] *Annales Mettenses priores* 33; *Continualtiones Fredegarii* 25.

[30] *Continualtiones Fredegarii* 25.

[31] *Annales Alamannici a.* 744 (*Monumenta Germaniae Historica*, SS 1. 1826.)

[32] *Continualtiones Fredegarii* 16.

[33] Jahn: *Ducatus Baiuvariorum... op. cit.* 184; Wolfram, H.: *Das Fürstentum Tassilos III., Herzogs der Bayern.* Mitteilungen der Gesellschaft für Salzburger Landeskunde 108. 1968. 159 sq.; Wolfram: *Die Geburt Mitteleuropas... op. cit.* 98 sq.

[34] *Annales Mettenses priores* 34; *Annales regni Francorum a.* 743; *Annales Altahenses maiores* 2. (*Monumenta Germaniae Historica*, SS 20. 1868.); *Annales Iuvavenses maximi a.* 732. (*Monumenta Germaniae Historica*, SS 30/2. 1934.); *Annales Sithienses a.* 742. (*Monumenta Germaniae Historica*, SS 13. 1881.); *Annales Lobienses a.* 742. (*Monumenta Germaniae Historica*, SS 13. 1881.); *Chronicon Vedastinum a.* 743. (*Monumenta Germaniae Historica*, SS 13. 1881.); *Continuationes Fredegarii* 26.

[35] Jahn: *Ducatus Baiuvariorum... op. cit.* 187.

Odilo made a peace, fully acknowledging his duke's rights.[36] Thus, it can be stated that the military events in 743 by no means sowed the seeds of discord between the Carolingians and the Agilolfings extending to several decades; instead, they confirmed the legitimacy of Odilo's rule as a duke.[37] Slowly prevailing over his brother, Pippin strived to assert Frankish influence over Bavaria through several channels; for example, through actively intervening in the appointment of the Carantanian princes following Boruth, Cacatius and Cheitmar[38] and in ordaining Virgil bishop of Salzburg, who was later involved in a conflict regarding several issues with Bonifatius vested with archbishop's powers by Carloman in 743.[39]

The latter case is worth outlining briefly because it implies that the duke had a direct say in appointing bishops; yet there is no information on this right being regulated in one way or another. All the more since the development of Bavaria's church organisation and system of bishoprics reached the final stage only owing to Bonifatius's operation and that with the duke's considerable assistance. On 15 May 719, pope Gregory II (715–731) assigned missionary duties to Bonifatius without specifying any particular target area;[40] then, on 30 November 722, he ordained him bishop and directed him towards the countries and territories inhabited by Germans,[41] and later received his reports and replied his questions.[42] By the time of Gregory III (731–741)–although there had been no accurately determined diocese borders–the period of wondering bishops in Bavaria had ended, they were replaced by (abbot)bishops having a permanent seat, on the one hand.[43] In the year following his ascension to the throne, in 732 it was the pope himself who commissioned Bonifatius, who was made archbishop through having been granted the *pallium* although he did not obtain a definite *metropolia*, to restructure the Bavarian church organisation

[36] *Annales Mosellani a.* 744. (*Monumenta Germaniae Historica*, SS 16. 1859.); *Annales Sithienses a.* 744.

[37] Jahn: *Ducatus Baiuvariorum... op. cit.* 190.

[38] *Conversio Bagoariorum et Carantanorum* 4. (*Monumenta Germaniae Historica*, Studien und Texte 15. 1997.)

[39] *Conversio Bagoariorum et Carantanorum* 2. Cf. H. Löwe: Ein literarischer Widersacher des Bonifatius, Virgil von Salzburg und die Kosmographie des Aethicus Ister. *Abhandlungen der geistes- und sozialwissenschaftlichen Klasse* 11. 1951.

[40] Ph. Jaffé: *Regesta pontificum Romanorum.* Graz, 1956. 2157; Bonifatius: Epistolae 12.

[41] Jaffé 2160. 2161; Bonifatius, *epistolae* 17; 18; 19; 21; 25.

[42] *Bonifatius: Epistolae* 24; 26; Th. Schieffer: *Winfried-Bonifatius und die christliche Grundlegung Europas.* Freiburg i. Br. 1980. 149 sqq.

[43] Wolfram, H.: *Die Zeit der Agilolfinger. Rupert und Virgil.* In: Dopsch, H. (Hrsg.): Geschichte Salzburgs I. Salzburg, 1981. 136 sqq.

and, if necessary, to ordain bishops.[44] Bonifatius visited Bavaria as early as in 719;[45] then, between 733 and 735 at the invitation of duke Hucbert he paid a visit to all the Bavarian dioceses.[46] Pope Gregory III appointed Bonifatius his legate, and in his letter addressed to the bishops of Bavaria and Alemannia he instructed them to gather in a meeting at a location beside the Danube defined by Bonifatius.[47] Bonifatius finally determined four bishop's seats: Regensburg, Passau, Salzburg and Freising–these towns had attained a significant role not only as secular centres, their sacred legitimation was ensured–as far as Regensburg, Salzburg and Freising is concerned–by the operation of missionaries, Haimhrammus/Emmeram, Hrodbertus/Rupert and Corbinianus/Korbinian.[48] He did not acknowledge the (abbot)bishops who operated at these four seats as diocese bishops–without questioning their rank as bishops–and fulfilled their places by bishops ordained by him: John in Salzburg, Erembert in Freising, and Gaubald/Gaibald in Regensburg.[49]

In Passau, in spite of his reserves, he left Vivilo in his office, which was confirmed by the pope although this confirmation had some reproving overtone.[50] In relation to Bonifatius nothing is said about Augsburg established a long time before setting up the Bavarian church organisation, and Säben ranked among Bavarian bishoprics later only; and the Bishopric of Eichstätt, which covered both Bavarian and Swabian territories, would be established only in 743/44.[51] The church organisation developed by Bonifatius soon became even more consolidated through maintaining local traditions. In Regensburg St Emmeram's relics were ceremonially placed; in 764 Tassilo had St Valentine's relics brought to Passau. In 765 bishop Arbeo placed the mortal remains of St Korbinian in Freising; finally, in 774, bishop Virgil arranged for paying honour to the relics of St Rupert and his companions in the dome of

[44] Jaffé 2239; *Bonifatius: Epistolae* 26; Schmidinger, H.: *Das Papsttum und die bayerische Kirche – Bonifatius als Gegenspieler Virgils.* In: Dopsch, H.–Juffinger, R. (Hrsg.): Virgil von Salzburg. Missionar und Gelehrter. Salzburg 1985. 94; Schieffer: *op. cit.* 153 sqq.

[45] *Vita Bonifatii auctore Willibaldo* 5. (*Monumenta Germaniae Historica,* SS rer. 1905.)

[46] *Vita Bonifatii* 6.

[47] Jaffé 2247; *Bonifatius: Epistolae* 44; Löwe, H.: *Bonifatius und die bayerisch–fränkische Spannung. Ein Beitrag zur Geschichte der Beziehungen zwischen dem Papsttum und den Karolingern.* In: Bosl, K. (Hrsg.): Zur Geschichte der Bayern. Darmstadt, 1965. 280 sq.

[48] Schmidinger: *op. cit.* 94.

[49] *Vita Bonifatii* 7; Reindel 1971. 229 sq.; Schieffer: *op. cit.* 180 sqq.

[50] *Bonifatius: Epistolae* 45; Jaffé 2251.

[51] Reindel: *Das Zeitalter der Agilolfinger... op. cit.* 230 sqq.

Salzburg.[52] Returning to the point of the duke's powers: it is known that until the dethronement of the Agilolfing dynasty in 788 the local council was chaired by the duke–since in Bavaria the archbishopric was set up only by pope Leo III (795–816) in 798, who raised Arn, bishop of Salzburg, Charlemagne's confidant to the archbishop's seat, and Salzburg to the function of archbishopric[53]–therefore, his power was close to the king's power, clearly demonstrated by the dating the charters of the period in accordance with the Bavarian duke's reign.[54]

II. With respect to *status libertatis* the separation based on the opposition of free-servant(slave) *(liber–servus)* was formulated already by Gaius, jurist in the 2nd c. AD;[55] and later this *divisio* was repeated by Charlemagne in *Capitularia missorum* pointing out that no third option, i.e., personal status should exist.[56] On the grounds of the above, it would be righteous to set out from the fact that the Bavarian legal system of the period adopted and provided for only these two statuses–well, in the sources there are numerous personal statuses in-between the above two. In the investigation of the concept of *libertas*, trends of research setting out primarily from German laws and using charters as basic sources constitute a kind of contrast, and it cannot be considered accidental that the former trend took up the cudgels for the so-called *Gemeinfreiheit* theory, and the latter developed and adopted the *Königsfreiheit* theory.[57] All German laws *(Volksrechte)* set out from dividing society into freemen *(liberi/ingenui)* and servants *(servus/ancilla/mancipium)*–accordingly, the earliest fragment of *Lex Romana Visigothorum*, which can be related to the name of king Eurich (466–484), imposes different punishments on *ingenuus* who

[52] Schmidinger : *op. cit.* 95.

[53] *Annales Iuvavenses maximi a.* 798; *Annales Iuvavenses maiores a.* 798. (*Monumenta Germaniae Historica*, SS 30/2. 1934.); Wolfram: *Die Geburt Mitteleuropas... op. cit.* 208.

[54] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 387 sq.; H. Brunner: *Deutsche Rechtsgeschichte I.* München–Leipzig, 1961. 213 sq.

[55] Kuebler. B.: Gaius, *Institutiones* 1, 9. Leipzig, 1926.

[56] *Capitulare missorum* Nr. 58, 1. (*Monumenta Germaniae Historica*, Capit. 1–2. 1883–1897.)

[57] See Schmitt, J.: *Untersuchungen zu den Liberi Homines der Karolingerzeit.* In: Europäische Hochschulschriftenreihe III. 1977. 83. Frankfurt–Bern 1977. 1 sqq.; Kölber, G.: *Die Freien (liberi, ingenui) im alemannischen Recht.* In: Schott, C. (Hrsg.): Beiträge zum frühalemannischen Recht. Veröffentlichung des Alemannischen Instituts Freiburg i. Br. 42. Brühl 1978. 38 sqq.; H. Krause: *Die liberi der lex Baiuvariorum.* In: Albrecht, D.–Kraus, A.–Rendel, K. (Hrsg.): Festschrift für M. Spindler. München, 1969. 41 sqq.

remove boundary-stones and on *servus* who implement the same deed;[58] and accordingly *"Wergeld"* could be imposed for killed, or injured *liber/ingenuus*; however, for killing or injuring a *servus* only compensation for damage was stipulated.[59] The phrase *sive ingenuus sive servus* is used in *Lex Romana Burgundiorum* drafted before 506 and *Lex Romana Visigorthorum* published in 506 as a natural expression.[60] (Alemannian laws clearly split even freemen into groups: *primus Alamannus, medianus Alamannus, minofletus.*[61])

The term *liber/ingenuus* is interpreted exclusively by the root *frei/fri* in each German language and dialect,[62] which result can be attained mostly through translations. The Old German texts of the 8th-9th c. interpret both *liber* and *ingenuus* as *fri*;[63] e.g., the fragments from Mondsee from the late 8th c.[64] The Old Alemannian Benedictine *regula* from approx. 800;[65] the hymns from Murbach from the 9th c.;[66] the *capitulare* from Trier from the mid 9th c.[67] The *Abrogans-glossarium* drafted in the mid 8th c. interprets the word *liber* as *frihals*;[68] in Notker's work *libertas* is covered by *frihalsi* and *friheit*; the Old Alemannian Benedictine *regula* use the phrase *frihals* in the sense of *liberation*. The terms *libertinus/libertus* are translated with terms *frilaz, fri, frigeling, frigilazzan* in the glosses.[69] From the *Lex Baiuvariorum* both the male and female forms can be identified regarding freed persons *(frilatz,*

[58] *Leges Visigothorum, tit.* 274. (*Monumenta Germaniae Historica*, LL nat. Germ. 1, 1. 1902.)

[59] C. Schott: Freiheit und Libertas. Zur Genese eines Begriffs. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 104. 1987. 92.

[60] *Leges Burgundiorum* 2, 1; 4, 1. (*Monumenta Germaniae Historica*, LL nat. Germ. 2, 1. 1892.); *Lex Romana Visigothorum* 9, 14, 1.

[61] *Leges Alamannorum* 3, 21. (*Monumenta Germaniae Historica*, LL nat. Germ. 5, 1. 1888.)

[62] Grimm, J.–W.: *Deutsches Wörterbuch 4, 1, 1.* Leipzig, 1878. 94 sqq.

[63] See Schott: *Freiheit und Libertas... op. cit.* 97 sq.

[64] Hench, G. A. (ed.): *The Mondsee Fragments.* Straßburg, 1890. 45. *Frii / alvualtento.*

[65] Steinmeyer, E. (Hrsg.): *Die kleineren althochdeutschen Sprachdenkmäler.* Berlin, 1916. 199. *Quia. Sive servus! Sive liber! / Eigin steti danta edo scalch edo frier.*

[66] Sievers, E. (Hrsg.): *Die Murbacher Hymnen nach der Handschrift.* New York–London, 1972. 41. *redemptione liberi / urchauffe frige.*

[67] Steinmeyer, E. (Hrsg.): *Die kleineren althochdeutschen Sprachdenkmäler.* Berlin, 1916. 305. *Ut omnis homo liber potestatem habeat ... / That ein iouuelihc man frier geuualt hane ...*

[68] Bischoff, B.–Duft, J.–Sonderegger, S. (Hrsg.): *Die „Abrogans"-Handschrift der Stiftsbibliothek St. Gallen.* St. Gallen, 1977. 191. *libertas / frihalsi; libera / frihals.*

[69] Köbler, G.: *Althochdeutsch-lateinisches Wörterbuch.* Gießen, 1984. 191 sq.

frilaza).[70] Only in a rather narrow scope do German law *(Volksrecht)* provide points of reference for determining the concept of *liber/ingenuus*:[71] in one of the manuscripts of *Lex Salica* the glosses from Malberg attaches the explanation *frio falcino (Freienraub)* to kidnapping freemen *(ingenuus).*[72] Among Langobardian laws those enacted by Liutprand use the term *frea* at two points to name free woman;[73] and in *Edictus* (!) *Rothari* the term *fulcfree (volksfrei)* can be read several times; e.g., in the somewhat pleonastic compound *mulier libera fulcfree.*[74]

Searching for the earliest written records among the literary remains of the German language that can be used for the purposes of the investigation of this paper, it is possible to get to the Gothic nouns *freihals* and *frijei*, and the adjective *freis* left to us from the 4th c.[75] However, the relation between these words and the Latin terms *libertas/liber* can be demonstrated only through the *medium* of Greek because the translation of the Bible into Gothic was based on the Greek text.[76] At the same time, *libertas* can be undoubtedly matched with the terms *freihals/frijei* because the locus *sive liberi sive servi* is interpreted in Justinian's *Novellae* as *eite eleuteroi eite douloi*,[77] and, accordingly, the term *fratels* can be matched with *apeleutheros* and *libertus.*[78] It deserves special attention that the adiectivum *freis* and its derivatives show close links with the words *frijon (philein, apagan, amare, diligere), frijonds (philos, amicus), frijathwa (agape, dilecti, caritas)*, which makes it absolutely clear that the German concept of freedom–as in numerous Indo-European languages[79]–might have originally belonged to the scope of concept of kinship/clan relations.[80]

[70] *Lex Baiuvariorum tit.* 5; 8, 10.

[71] Cf. G. v. Olberg: *Freie, Nachbarn und Gefolgsleute. Volkssprachige Bezeichnungen aus dem sozialen Bereich in den frühmittelalterlichen Leges.* Frankfurt a. M.–Bern–New York, 1983. 103 sqq.

[72] *Lex Salica* 67. (*Monumenta Germaniae Historica,* LL nat. Germ. 4, 2. 1965.)

[73] *Liutprandi Leges* 94; 120. (*Monumenta Germaniae Historica,* LL nat. Germ. 4. 1869.)

[74] *Edictus Rothari* 257. (*Monumenta Germaniae Historica,* LL nat. Germ. 4. 1869.)

[75] W. Streitberg: *Die gotische Bibel II: Gotisch-Griechisch-Deutsches Wörterbuch.* Heidelberg, ^{6}1971. 38 sq.

[76] Schott: *Freiheit und Libertas... op. cit.* 100.

[77] *Novellae Iustiniani* 5, 2. Berlin, 1928.

[78] Schott: *Freiheit und Libertas... op. cit.* 100 sq.; Köbler, G.: *Verzeichnis der lateinisch-gotischen und der gotisch-lateinischen Entsprechungen der Bibelübersetzung.* Göttinger Studien zur Rechtsgeschichte, Sonderband 16/17. Göttingen, 27.

[79] Walde, A.–Pokorny, J.: *Vergleichendes Wörterbuch der indogermanischen Sprachen II.* Berlin–Leipzig, 1975. 86 sq.

[80] Schott: *Freiheit und Libertas... op. cit.* 101.

Accordingly, those who belonged to the scope embraced by this concept–that is, to kinship/clan relations–could be considered protected, in spite of the fact that this social/legal process, and the process of changes in the meaning of the words cannot be followed up step by step.[81] In this case, kinship relations, as a matter of fact, cannot be construed as blood relationship *stricto sensu*, much rather a sort of belonging/alliance relation, which included, in addition to servants(slaves), the entourage. The social/clan structure developing during this process brought along as a natural consequence the evolution of subordination and superordination; and to qualify freemen it was required for a person to be able be covered by the influence of the entity exercising power, that is, the state; i.e., such person should not be under control of another person (limiting freedom). Thus, the concept of freedom that shows close links with Roman law traditions is nothing else than the sine qua non of the development of statehood, which was instrumental in clearly separating the scope of subjects-at-law, that is, the direct addressees of state regulations and the persons that could not be considered subjects-at-law.[82]

As regards persons in free status, *Lex Baiuvariorum* reveals the following. The *"Wergeld"* for a free Bavarian person, either killed or unlawfully sold, was determined by law as one hundred and sixty *solidi*,[83] plus forty *solidi* to be paid to the *fiscus*.[84] Freemen were subject to the judicial power of the duke exercised by the *dux* through his counts *(comites)* and judges *(iudices);* therefore, it is not by chance that all statutory provisions regarding freemen–except for provisions on their personal protection–are set forth in the second part of *Lex Baiuvariorum* on matters to be handled by the duke.[85] On the other hand, statutory provisions–which set out from the ideal picture formed of the freemen who constituted the core of Bavarian *gens*–do not supply extended information on the rate of freemen in the society of the period.[86] The Bavarian army consisted mostly of freemen; at the same time, warriors included people of lower ranks *(homines minores)*[87] and servants *(servi)*.[88] Each part of the army *(comitatus)* was headed by a count *(comes)*, who controlled *centuriones*

[81] Dilcher, G.: *Freiheit.* In: Handwörterbuch zur deutschen Rechtsgeschichte I. Berlin, 1971. 1228 sqq.

[82] Schott: *Freiheit und Libertas... op. cit.* 104 sq.

[83] *Lex Baiuvariorum* 4, 28.

[84] Brunner: *op. cit.* 334.

[85] *Lex Baiuvariorum tit.* 2.

[86] Jahn: *Ducatus Baiuvariorum... op. cit.* 228.

[87] *Lex Baiuvariorum* 2, 4.

[88] *Lex Baiuvariorum* 2, 5.

and *decani*.[89] Bavarians in the status of freemen–after having handed over their share of the inheritance to their successors–were allowed to grant their property to the church, and the duke did not have the right to submit any reserve against it.[90] After taking into account the widow's rights, only male successors were vested with the right of succession; that is, by then the right of succession of the larger scope–of the clan–had been thrust in the background by the family right of succession;[91] the clan *(gens/Sippe)* included relatives even of the seventh grade; and originally right of succession extended to the same grade.[92] The significance of *gens* is demonstrated by the rule on cleansing oath since the twelve companions taking the oath had to come from the clan of the person taking the oath *(de suo genere)*.[93]

Freemen were obliged to attend meetings serving public jurisdiction purposes *(placita/Ding)*, arranged by the duke's *iudex* at the beginning or middle of each month.[94] Persons not in the status of freemen could obtain freedman/liberated status *(frilaz)* through being set free *(manumissio)*.[95] However, it was possible to lose freedom, e.g., the *ingenua* who committed abortion was given by the duke into the service *(servitium)* of another free person.[96] If the assets of the person who caused damage did not cover the amount of blood money or compensation for damage such person had to enter the *servitium* of another person, and were obliged to settle the amount of the sanction in monthly or yearly instalments from the amount so acquired.[97] Once completing the above, he most probably regained freedom, which again confirms the picture developed about the possibility of mobility/transfers between statuses.[98] *Lex Baiuvariorum* provided the members of free but poor layers with the option of placing themselves and their property under the

[89] *Lex Baiuvariorum* 2, 5.

[90] *Lex Baiuvariorum* 1, 1.

[91] Jahn, J.: *Tradere ad Sanctum. Politische und gesellschaftliche Aspekte der Traditionspraxis im agilolfingischen Bayern.* Wehler, H. V.: Gesellschaftsgeschichte 1. 1988. 400 sqq.; Jahn: *Ducatus Baiuvariorum... op. cit.* 228.

[92] *Lex Baiuvariorum* 15, 10.

[93] *Lex Baiuvariorum* 8, 15.

[94] *Lex Baiuvariorum* 2, 14.

[95] Wolfram, H.: Salzburg, Bayern, Österreich. Die Conversio Bagoariorum et Carantanorum und die Quellen ihrer Zeit. *Mitteilungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband,* 31. 1995. 146; *Lex Baiuvariorum tit.* 5. *De liberis, qui per manum dimissi sunt liberi, quod 'frilaz' vocant.*

[96] *Lex Baiuvariorum* 8, 18.

[97] *Lex Baiuvariorum* 2, 1.

[98] Jahn: *Ducatus Baiuvariorum... op. cit.* 229.

protection of a person with larger power and property; a similar kind of *commendatio* to the duke was also possible.[99] One of the provisions of *Lex Baiuvariorum* regards the members of the entourage of the (Frankish) king the king's vassals *(vassi)*, who were also subject to the duke's *iurisdictio*,[100] but of these *vassi*–although their presence in Bavaria, and their increasing significance from duke Odilo's period cannot be ruled out–nothing is said in the sources regarding the period before 787, that is, the vassal's *commendatio* made by Tassilo before Charlemagne. Consequently, it can be assumed that this passage was included in the text of *Lex Baiuvariorum* after 788.[101] The significant social differences between freemen equal in theory were at some points taken into account in *Lex Baiuvariorum*; e.g., the leader of riots against the duke *(carmulum)*[102] was obliged to pay a penalty of six hundred, his companions two hundred, and people of low order *(minor populus)* but in freemen status joining them forty *solidi*.[103]

Contrary to freemen, servants *(servi)* were not entitled to *potestas* to make them able to dispose of themselves and their property. Although *Lex Baiuvariorum* provides for servants who had property *(facultates)*,[104] in theory and generally they were subject to their lord's authority,[105] who was entitled to donate or devise them free from burdens. The campaigns of the duke outside the borders of the country were also good occasions for getting servants.[106] Their value was usually determined at twelve *solidi;* however, in the case that a servant was killed his lord was entitled to twenty *solidi*, that is, half of the *"Wergeld"* for a *libertinus*.[107] Similarly to freemen, servants did not constitute a legally homogenous group: the class of servants ranged from *mancipium* living in full dependence to *servus*, regarding whom *Lex Baiuvariorum* ran the risk to state that they would kidnap and sell a freeman, and consequently sanctioned this deed.[108] The Bavarian army included servants,[109] and *Lex Baiuvariorum* refers to the state of facts where it prohibits any relation

[99] *Lex Baiuvariorum* 4, 28.

[100] *Lex Baiuvariorum* 2, 14.

[101] Jahn: *Ducatus Baiuvariorum... op. cit.* 231.

[102] Cf. *Conversio Bagoariorum et Carantanorum* 5. ... *orta seditione, quod carmula dicimus.*

[103] *Lex Baiuvariorum* 2, 3.

[104] *Lex Baiuvariorum* 10, 1; 16, 6.

[105] *Lex Baiuvariorum* 1, 6.

[106] *Lex Baiuvariorum* 16, 11, 14.

[107] *Lex Baiuvariorum* 13, 9; 6, 12.

[108] *Lex Baiuvariorum* 16, 1; 9, 5.

[109] *Lex Baiuvariorum* 2, 5.

between a free woman and a man in servant status,[110] whereas a freeman was entitled to marry a servant woman *(ancilla)*, although the successors were entitled to limited right of successions only.[111] The law adduces to the presence of servants *(servi)* in the duke's court[112] where they had the option to rise[113] as it is shown by the example of Tonazan and Ledi told concerning *cella Maximiliani* in *Libellus Virgilii*, which constitutes the core of *Breves Notitiae*.[114] It was just due to their border guarding duties that the members of *genealogia Albina* qualified *adalscalhae*, *exercitales homines*–and later *servi fiscalini*, or servants not deprived of their freedom–and several of them rose to church dignitaries' positions.[115] *Aldiones* who appeared in several cases as the subject of *traditiones* were at the same level with liberated/freedmen *(libertini)*[116] since also in Langobardian law successors of liberated parents qualified *aldiones*, and were clearly separated from servants,[117] especially when considering Langobardian *aldii ministeriales*, who fulfilled highly important (as it were administrative) functions.[118] It cannot be ruled out that this term was borrowed by Bavarian law from the Langobards.[119] Owing to their special status, only the duke's family could afford donating *aldiones*.[120]

III. *Lex Baiuvariorum* formally vested the duke from the Agilolfing dynasty, ordered and bound to be loyal by the Frankish king, with hereditary ruler's rights[121] but loyalty to the king and leading the Bavarian army did not involve the obligation to join the royal army unconditionally and at all times.[122] The

[110] *Lex Baiuvariorum* 8, 2. 9.

[111] *Lex Baiuvariorum* 15, 9.

[112] *Lex Baiuvariorum* 2, 10.

[113] Jahn: *Ducatus Baiuvariorum... op. cit.* 245.

[114] *Breves Notitiae* 3, 1 sqq.; 8, 1 sqq.

[115] Jahn: *Ducatus Baiuvariorum... op. cit.* 246 sq.

[116] *Traditio Frisingensis* Nr. 46a. 50. 58. 62. 63. (*Quellen und Erörterungen zur bayerischen und deutschen Geschichte.* Neue Folge 4–5. 1905–1909.)

[117] Mayer, E.: *Italienische Verfassungsgeschichte von der Gothenzeit bis zur Zunftherrschaft I–II.* Leipzig, 1919. I. 159 sqq.

[118] G. v. Olberg: *Freie, Nachbarn und Gefolgsleute. Volkssprachige Bezeichnungen aus dem sozialen Bereich in den frühmittelalterlichen Leges.* In: Schmidt-Wiegand, R. (Hrsg.): Germanistische Arbeiten zur Sprach- und Kulturgeschichte II. Frankfurt–Bern–New York, 1983. 80.

[119] Brunner: *op. cit.* 357.

[120] Jahn: *Ducatus Baiuvariorum... op. cit.* 248.

[121] *Lex Baiuvariorum* 3, 1; Wolfram: *Die Geburt Mitteleuropas... op. cit.* 387 sqq.; Störmer: *op. cit.* 14 sqq.

[122] Jahn: *Ducatus Baiuvariorum... op. cit.* 222.

duke must have undoubtedly been the landowner with the greatest property in his province; yet, rather scarce information is available on the administration of duke's estates and *villae publicae*, which also belonged to the duke's assets.[123] Bavarian dukes–similarly to Langobardian rulers and the Carolingians–sometimes divided their country into sub-dukedoms among their sons as duke Theodo's example shows.[124] The duke played an active part in the Bavarian church too: he founded numerous monasteries and provided them with goods.

The scope of persons baptised by Rupert is defined in *Gesta Sancti Hrodberti confessoris* drafted after 793–which, however, goes back to *Vita Hrodberti* written by bishop Virgil in approx. 746/47[125]–as the duke and several of the nobles of the *gens (multi alii illius gentis nobiles viri);*[126] and in *Breves Notitiae* written between 798 and 800 as duke Theodo and Bavarian dignitaries *(proceres sui Baioarii).*[127] *Gesta Hrodberti* claims that Rupert was received by the duke himself and his entourage *(satellites) in* Regensburg,[128] but the term *satellites* denoting the entourage was replaced by the more colourless pronoun *sui* in chapter one of *Conversio Bagoariorum et Carantanorum* written in 870[129]–which is recognised as another variant of *Vita Hrodberti.*[130] So each of the above descriptions relates on the duke and his environment, entourage who received Rupert with due respect and being open to Christianity. Belonging to the duke's environment raised the members of the entourage to a higher social level; and, accordingly, the original *satrapes* were replaced by *nobiles* in

[123] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 391.

[124] Jahn: *Ducatus Baiuvariorum... op. cit.* 76 sqq.

[125] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 228; Lošek, F.: *Die Conversio Bagoariorum et Carantanorum und der Brief des Erzbischoft Theotmar von Salzburg. Monumenta Germaniae Historica,* Studien und Texte 15. 1997. 26.

[126] *Gesta sancti Hrodberti confessoris* 4. (*Monumenta Germaniae Historica,* SS rer. Merov. 6. 1913.) *Quem vir Domini mox coepit de christiana conversatione ammonere et de fide catholica inbuere ipsumque vero et multos alios illius gentis nobiles viros ad veram Christi fidem convertit et in sancta corroboravit religione.*

[127] *Breves Notitiae* 1, 1. *Primo igitur Theodo dux Baiovariorum dei omnipotentis gratia instigante et beato Rudberto episcopo predicante de paganitate ad christianitatem conversus et ab eodem episcopo baptizatus est cum proceribus suis Baioariis.*

[128] *Gesta sancti Hrodberti confessoris* 4. *Hoc audiens praefatus dux, magno perfusus est gaudio obviamque illi cum satellitibus pergens et sanctum virum evangelicumque doctorem cum omni honore et dignitate, sicut decentissimum erat, in Radesbona suscepit civitate.*

[129] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 193.

[130] *Conversio Bagoariorum et Carantanorum* 1.

chapter nine of the 9th c. version of *Vita Corbiniani* written by Arbeo.[131] The *satellites*, and *satrapes* attended the duke's *consilia*,[132] and as *satrapes terrae* disposed of significant estates,[133] but sources do not give an answer to the question if they stayed permanently at the duke's court in Regensburg, or only for defined periods, or visited there occasionally.[134] The military nature of this entourage can be deduced from the specification *cohors*.[135] The duke might have assigned various duties to delegates *(missi)*, e.g. supervising the operation of dioceses,[136] which institution developed later in the empire of the Carolingians.[137]

The duke's administration also included *centenaria*, *actores* subjected to the count's authority–a title used on one occasion as a synonym of count[138]–they administered the duke's benefices,[139] just as the *castaldia*, who appeared in the last phase of the age of the Agilolfings and bore a Langobardian function.[140] In addition to office holders, the duke's agents and the executors of his orders were provided with a relatively great elbow room and authority in the fulfilment of their military and administrative duties by the *Lex Baiuvariorum*[141] since both them and their successors were secured by the duke's protection, which was meant to ensure continuity from one generation to the other of those acting in the duke's administration.[142] If they died in war or while fulfilling their duties, their successors–whether freemen or servants–

[131] Arbeo, *Vita Corbiniani* B 9. (*Monumenta Germaniae Historica*, SS rer. Merov. 6. 1913.); Bosl, K.: *Der „Adelsheilige". Idealtypus und Wirklichkeit. Gesellschaft und Kultur im merowingerzeitlichen Bayern des 7. und 8. Jahrhunderts, Gesellschaftsgeschichtliche Beiträge zu den Viten der bayerischen Stammesheiligen Emmeran, Rupert, Korbinian.* In: Prinz, F. (Hrsg.): Mönchtum und Gesellschaft im Frühmittelalter. Darmstadt, 1976. 381.

[132] Arbeo, *Vita Haimhrammi* 12. (*Monumenta Germaniae Historica*, SS rer. Germ. 1920.)

[133] Arbeo, *Vita Haimhrammi* 10.

[134] J. Jahn: Bayerische „Pfalzgrafen" im 8. Jahrhundert? Studien zu den Anfängen Herzog Tassilos (III.) und zur Praxis der fränkischen Regentschaft im agilolfingischen Bayern. *Regio. Forschungen zur schwäbischen Regionalgeschichte*, 1: Früh- und hochmittelalterlicher Adel in Schwaben und Bayern. Sigmaringen 1988. 89 sq.

[135] Arbeo, *Vita Haimhrammi* 16.

[136] *Traditio Frisingensis* 104; Brunner: *op. cit.* II. 253.

[137] Jahn: *Ducatus Baiuvariorum... op. cit.* 225.

[138] Hauthaler, W. (Hrsg.): Salzburger Urkundenbuch I. Salzburg, 1910. 51.

[139] Brunner: *op. cit.* II. 169.

[140] *Traditio Frisingensis* 13; Mayer: *op. cit.* II. 256 sq.; Jahn: *Ducatus Baiuvariorum... op. cit.* 226.

[141] *Lex Baiuvariorum* 2, 13.

[142] Jahn: *Ducatus Baiuvariorum... op. cit.* 226.

could inherit their entire property, and the law gave reasons for this exceptionally protected status. None should hesitate to observe the duke's command![143] Similarly, homicide committed on the orders of the duke resulted in no punishment; no revenge could be taken either on the perpetrator of the act or his successors.[144] All these benefits must have made the duke's service a highly favourable and advantageous option to any social layer.[145]

Bavarian *genealogiae*–which are treated under a separate title in *Lex Baiuvariorum*[146]–are topped by the Agilolfings as *summi principes*, who stood out among other *genealogie*, in addition to their hereditary duke's rank, for their blood money being four times the amount of the blood money of a Bavarian freeman, while the *"Wergeld"* of the members of other *genealogiae*–who were as it were the first (that is, had the highest rank) after the Agilolfings in Bavaria–amounted to double *"Wergeld"* the of a Bavarian freeman.[147] The *"Wergeld"* of the members of the *gens Agilolfingarum* was exceeded by the duke's*"Wergeld"*, which was determined by law as an amount equal to the amount of the *"Wergeld"* of his relatives plus one third thereof.[148] The double *"Wergeld"* of members of the *genealogiae* makes it possible to compare them both in terms of their social and political significance to the Longobard *primi*, who were also protected and provided the king's entourage; all the more since in the Bavarian legal system and social structure of the age of the Agilolfings several elements and comparable aspects of Longobard origin can be identified.[149] As regards the five *genealogiae* (Hosi/Huosi, Drazza/Trazza, Fagana, Hahilinga, Anniona[150]) specified in *Lex Baiuvariorum* it cannot be ruled out that somehow they reflect the stage of the Bavarian ethnogenesis where various Bavarian tribal groups having merged as Bavarian *gens* brought along the layer of their leaders, who were given a part in further political development.[151] Curiously, various sources of charters do not include each *genealogia*: from the age of the Agilolfings information is available only on the *genealogia Fagana*, and although certain members of the *genealogia Huosi*

[143] *Lex Baiuvariorum* 1, 7.
[144] *Lex Baiuvariorum* 2, 8. Cf. Mayer: *op. cit.* II. 208.
[145] Jahn: *Ducatus Baiuvariorum... op. cit.* 227.
[146] *Lex Baiuvariorum tit.* 3.
[147] *Lex Baiuvariorum* 3, 1.
[148] *Lex Baiuvariorum* 3, 1.
[149] Mayer: *op. cit.* II. 209 sq.; Jahn: *Ducatus Baiuvariorum... op. cit.* 233.
[150] *Lex Baiuvariorum* 3, 1.
[151] E. Klebel: *Bayern und der fränkische Adel im 8. und 9. Jahrhundert.* In: Beyerle, F.–Büttner, H.–Dienemann-Dietrich, I.: Grundfragen der alemannischen Geschichte. Vorträge und Forschungen 1. 1955. 196.

are referred to in the age of the independent Bavarian Dukedom, as a uniform *genealogia* they played an active political role only after the dethronement of the Agilolfings, and the Carolingians' having seized power. In addition to assuming political roles, the *genealogia Fagana* and the *genealogia Huosi* must have been the most significant landowners in Bavaria beside the duke. Since, however, the charters of the age of the Agilolfings and the Carolingians mention only the aforesaid two *genealogiae*, in contrast with the five *genealogiae* described in *Lex Baiuvariorum,* it can be declared that *Lex Baiuvariorum* presents archaic conditions that had become outdated by the 8th c.[152] On the other hand, sources include *genealogiae*–for example, the *genealogia Feringa*[153]– which were not entitled to *potestas* to enable them to dispose of their real estates in various legal transactions; instead of them the duke implemented *traditiones* since they were subjected to the duke as members of his entourage.[154]

On the grounds of all that, two kinds of the Bavarian *genealogiae* can be distinguished: on the one hand, the old *genealogiae* directly following, in terms of their nobility, the Agilolfings–called *Geschlechtsadel*, or *alter Geburtsadel* by Brunner,[155] who were provided with prioritised positions owing to both of their legal status and political role. On the other hand, the new *genealogiae* belonging to the duke's entourage, who fulfilled both military and administrative duties.[156] From among the new *genealogiae* subject to the duke it is worth mentioning the *genealogia Albina*, who fulfilled border guarding duties along the frontiers shared with the Slavs, and who represented the adverse actors versus bishop Virgil in the dispute evolved regarding *cella Maximiliani* and described in *Libellus Virgilii* and *Breves Notitiae.*[157] The members of this genealogy rose from the group of Bavarians in status of freemen for they executed services for the duke as *exercitales homines*; in Virgil's presentation, however, they were described as *servi*, in spite of the fact that he uses the category *genealogia* also in their case.[158] Between the more ancient *genealogiae* mentioned in the *Lex Baiuvariorum* and the Agilolfings, dynastic marriages might have been concluded because some members of the *genealogia Huosi* bore names typical of the Agilolfings (Egilolf, Odilo,

[152] Jahn: *Ducatus Baiuvariorum... op. cit.* 233 sq.
[153] *Traditio Frisingensis* Nr. 5.
[154] Brunner: 1971. I. 117. Cf. *Edictus Rothari* 177.
[155] Brunner: *op. cit.* I. 343. 348.
[156] Jahn: *Ducatus Baiuvariorum... op. cit.* 235.
[157] *Breves Notitiae* 8, 1 sqq.
[158] Jahn: *Ducatus Baiuvariorum... op. cit.* 246.

Lantfrid).[159] The Agilolfings and the *genealogiae* constituted the Bavarian nobility. The Bavarian *genealogia* can be compared to the Langobardian concept of *fara*, which was bound together also by blood relations as a military alliance.[160] The power of the *genealogiae* and the danger they implied to the duke's power are clearly demonstrated by the provisions of *Lex Baiuvariorum* that stipulate that the duke shall be entitled to adopt a judgment on dignitaries *(homines potentes)* who call the enemy into the country and surrender the *civitas*[161] (presumably the duke's seat, Regensburg) to them, and ignite riots.[162] Engaging a causistic approach, *Lex Baiuvariorum* probably would have not provided for these cases if it had not deemed there were reasonable chances for them to occur.[163]

Lex Baiuvariorum reached an important stage in Bavarian law-making at the Council of Dignolfing, which created the *novellae* transplanting changes in the social structure into the law. The Council of Dignolfing held with the participation of six bishops and thirteen abbots[164] can be dated to the seventies of the 8th c.; yet its date can be specified even more accurately. The date of the death of Wisurih, bishop of Passau attending the council (1 May 777) can be considered *terminus ante quem*.[165] The minutes of the council was signed as doyen by Manno, bishop of Freising, who was followed in his seat by Oadalhart very soon in 777;[166] and Fater, abbot of Kremsmünster ordained on 9 November 777 had not attended the synod yet. On the grounds of all the above it is reasonable to assume that the Council of Dingolfing must have been held in the first months of the year 777.[167] At the Council of Dingolfing, Tassilo and his advisors renewed some paragraphs of *Lex Baiuvariorum*, which enabled them to guarantee to the nobles, freemen and the duke's servants, i.e.,

[159] *Traditio Frisingensis* Nr. 19. 142. 184. 185.

[160] Paulus Diaconus, *Historia Langobardorum* 2, 9. *Monumenta Germaniae Historica*, SS rer. Lang. 1878.); Mayer 1919. I. 14 sq.; Jarnut, J.: *Agilolfingerstudien. Geschichte einer adligen Familie im 6. und 7. Jahrhundert.* Monographien zur Geschichte des Mittelalters 32. Stuttgart, 1986. 110 sqq.

[161] About the terms *civitas* and *oppidum* see Koller, F.: Die Anfänge der Salzburger Städte, civitas und verwandte Begriffe in den Salzburger Quellen. *Mitteilungen der Gesellschaft für Salzburger Landeskunde*, 128. (1988) 11 sqq.

[162] *Lex Baiuvariorum* 2, 1. 3. 5.

[163] Jahn: *Ducatus Baiuvariorum... op. cit.* 238.

[164] Abel, S.–Simson, B.: *Jahrbücher des fränkischen Reiches unter Karl dem Großen I–II.* Berlin, 1969. I. 54.

[165] Wolfram: *Die Geburt Mitteleuropas... op. cit.* 161; 502.

[166] *Traditio Frisingensis* Nr. 86.

[167] Jahn: *Ducatus Baiuvariorum... op. cit.* 512 sq.

the *adalscalhae, (nobiles et liberi et servi eius)* statutory protection already obtained during duke Odilo's period, and the right to law *(ius ad legem)*,[168] which led to the rising of the *adalscalhae*, on the one hand; and the development of the independent *ordo* of nobles, on the other.[169] It was in this spirit that the Council of Dingolfing determined the necessity of the presence of three reliable noble witnesses required for demonstration by documentary evidence,[170] whereas *Lex Baiuvariorum* does not say anything of the personal status of witnesses.[171] Both Odilo–having learned his lesson from his earlier failure–and Tassilo made efforts to win over the loyalty of *nobiles* and *adalscalhae* through donating them inheritable estates, although they made this donation subject to discharging duties in the duke's service[172] and other services not specified.[173] It should be added that this ruler's practice can be compared to the oath of allegiance obtained from the royal *arimanni*, i.e., office holders, by the Langobardian king, Liutprand, whom he strived to bind to him through granting them estates and limited right of disposal of estates as a positive motivation.[174] Getting increasingly separated from freemen, prevailing over them and having maintained considerable political and economic influence for a long time, this layer fought for and achieved most probably at the Council of Dingolfing–as it were as a compromise entered into with duke Odilo, who re-obtained his rule with the assistance of the Franks but was unable to rule in the long run without the approval of the Bavarian dignitaries, and assumed by duke Tassilo–the legal formulation of their acknowledgement as an independent order of nobles.[175] The sources reflecting the conditions that prevailed in the first half of the 8th c. did use the term *nobilis*[176] but in several

[168] *Concilium Dingolfingense* 5. Hannover–Leipzig, 1906.

[169] Wanderwitz, H.: Quellenkritische Studien zu den bayerischen Besitzlisten des 8. Jahrhunderts. *Deutsches Archiv für Erforschung des Mittelalters*, 39 (1983) 68 sqq.; Jahn: *Ducatus Baiuvariorum... op. cit.* 250; 513; Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 149.

[170] *Concilium Dingolfingense* 2.

[171] *Lex Baiuvariorum* 1, 1.

[172] Cf. *Traditio Frisingensis* Nr. 49.

[173] *Concilium Dingolfingense* 8.

[174] *Liutprandi notitia de actoribus regis* 5.

[175] Jahn: *Ducatus Baiuvariorum... op. cit.* 251; Strömer, W.–Mayr, G.: *Herzog und Adel.* In: Dannheimer, H.–Dopsch, H. (Hrsg.): Die Bajuwaren von Severin bis Tassilo 488–788. 1988. 157.

[176] *Gesta sancti Hrodberti confessoris* 1; Arbeo, *Vita Haimhrammi* 2. 3; *Vita Corbiniani* 37.

cases only as a hagiographic *topos*,[177] and by no means as a terminus technicus. *Lex Baiuvariorum* applies the term *nobilis* no more than on two occasions;[178] however, they do not help to demonstrate any consistency in the use of terms.[179]

As a matter of fact, it is possible to speak about nobles in Bavaria before Odilo's period as the duke himself and the *genealogiae* referred to in *Lex Baiuvariorum* undoubtedly belonged to the nobility but it was by the 8th c. that the nobility as a uniform and legally acknowledged layer had fully developed, and obtained their attributes that had existed before but became clear cut only now: giving noble names; possessing huge and sometimes geographically scattered estates; having the right of disposal of private churches, and making efforts to attain such rights; and having the right to take part in the duke's rule and governance.[180] After power had been seized by the Franks in Bavaria, Charlemagne's government was surprised to see and admit the Bavarian nobility's resolute insistence on keeping their rights, and the nobility–especially to ensure their estates–powerfully emphasised their privileges provided by their origin,[181] which clearly reveals that by the last phase of the Agilolfings' rule *genus nobilium* had unambiguously developed having privileges ensured by and enshrined in legal acts.[182]

The Council of Dingolfing confirmed the privileged *"Wergeld"* of the ruler, i.e., the duke, the servants, that is the noble servants, i.e., the *adalscalhae (servi principis qui dicuntur adalscalhae)*,[183] who directly belonged to the duke's entourage and through that considerably rose on the social ladder, which justified their peculiarly contradicting personal status of being nobles and servants simultaneously that cannot be matched with any status in the Frankish legal system.[184] [To make the usual translation of *adalscalha* with the term *Edelknecht* somewhat relative,[185] it can be compared with the term *adalporo*–in *Notitia Arnonis* the word *adalporo* denotes the tax that the inhabitants of Reichenhall were obliged to pay to the duke as a kind of *census*

[177] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 233 sqq.

[178] *Lex Baiuvariorum* 18, 1; 21, 6.

[179] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 147.

[180] Jahn: *Ducatus Baiuvariorum... op. cit.* 252 sq.

[181] Cf. *Traditio Frisingensis* Nr. 13. 127.

[182] Cf. *Notitia Arnonis* 6, 23. *Mitteilungen der Gesellschaft für Salzburger Landeskunde*, 130. 1990.

[183] *Conc. Dingolf.* 7; Wolfram: *Die Geburt Mitteleuropas...* 335 sq.; 400 sq.

[184] Brunner: *op. cit.* I. 374. sk.

[185] Wolfram, H.: Der heilige Rupert in Salzburg. In: Zwink, E. (Hrsg.): *Frühes Mönchtum in Salzburg.* Salzburger Diskussionen 4. Salzburg, 1983. 85.

dominicus.[186] The base *-poro/-paro* can be related to the Greek word *phoros* meaning *tax*; therefore, *adalporo* might have meant the tax that the noble *(adal-)* was entitled to. On the grounds of the *adalscalha*-definition of the Council of Dingolfing *(servi principis)*,[187] this term might have denoted the persons acting in the service of the noble, that is, the duke.[188] This interpretation is supported by the specification *servi (homines) dominici* used in *Breviarius Urolfi*,[189] which corresponds with *census dominicus* applied in *Notitia Arnonis*.[190] As the aforesaid tax was due and payable to the person whom these sources named *adal-* as a specification solely applied to him, that is, the duke, it is undoubted that the *adalscalhae* were meant to serve him.[191]] The *adalscalhae* were entitled to marry women of noble origin, which again clearly indicates mobility in the Bavarian society of the period;[192] upon Tassilo's fall in 788 and legitimised dethronement in 794,[193] the subjection of the *adalscalhae* to the duke terminated, and they became in terms of their name free servants, *barscalhae*, and in terms of their status freemen.[194]

The development and regulation of the personal status of the *adalscalhae*, which was logically not free from contradictions but was by all means unique and suited the purposes of the duke's rule, reveals the roots of the evolution of a peculiar Bavarian vassal's system somewhat ahead of the Frankish development, which later, however, due to the Franks' gaining dominance, came to a standstill and could not reach its fully developed stage.[195] The protection of persons representing the support of the duke's power was widened in legislation to the extent that in addition to the three capital offences set forth in *Lex Baiuvariorum*[196] the Council of Dingolfing introduced

[186] *Notitia Arnonis* 7, 6. ... *et hoc decrevit censum dare unusquisque homo, qui in Hal habitaret, quod barbarice dicitur adalporo* ...

[187] *Concilium Dingolfingense* 7.

[188] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 149 sq.

[189] *Breviarius Urolfi* 1, 21. 23. *Beiträge zur deutschen Sprach-, Geschichts- und Ortsforschung* 3, 11. 1854.)

[190] *Notitia Arnonis* 7, 6.

[191] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 150; Jarnut: *op. cit.* 79 sq.

[192] *Concilium Dingolfingense* 10.

[193] Cf. Kolmer. L.: Zur Kommendation und Absetzung Tassilos III. *Zeitschrift für bayerische Landesgeschichte*, 43 (1980) 297 sqq.; Wolfram. H.: Das Fürstentum Tassilos III., Herzogs der Bayern. *Mitteilungen der Gesellschaft für Salzburger Landeskunde*, 108 (1968) 159 sqq.

[194] Cf. *Traditio Frisingensis* Nr. 193; Wolfram: *Die Geburt Mitteleuropas...* 400; Jahn: *Ducatus Baiuvariorum... op. cit.* 255.

[195] Jahn: *Ducatus Baiuvariorum... op. cit.* 256.

[196] *Lex Baiuvariorum* 2, 1.

homicidium, the act of murdering persons with close ties to the ruler *(homo principis sibi dilectus)*,[197] which was to guarantee the security and safety of the *adalscalhae*, on the one hand; and freemen and nobles who belonged to the duke's environment and administration, on the other.[198] Although the estates donated by the duke *(beneficia)* could be devised, re-donating them was subject to the duke's prior *consensus* and *licentia* since the ruler was entitled to exercise control over changes in estate conditions.[199] Whereas, the duke donated certain estates with rights of full disposal to persons loyal to him; e.g., being considered firm support of both Odilo and Tassilo, count Machelm was entitled to re-donate estates without the duke's prior consent.[200] The donations listed in *Notitia Arnonis* could be divided into the *traditiones* of Bavarian freemen and persons not having power over themselves *(homines potestatem non habentes de se)*;[201] and, complying with the above in content, albeit, applying somewhat modified terminology, *Breves Notitiae* distinguishes between donations granted by nobles (that is, freemen) and commons (that is, those who had no power): *nomina et praedia fidelium virorum nobilium et mediorcum*.[202] Similarly, the *traditiones* of Freising include the act of *ducalis consensus*: having fallen of the horse, in 772 Hiltiprant felt he would soon die, and applied for the duke's licence to donate his goods to the bishopric of Freising, and the duke gave Hiltiprant the licence owing to the kinship relation maintained with him and the services discharged by him.[203]

The counts in the period of the Carolingians fulfilled their *ministerium* under the king's commission, which they could of course not devise to their descendants.[204] Regarding Bavaria, however, sources mention counts even in the period of the Agilolfings. E.g., count Gunther, who founded the monastery of Otting in 749, and who is, therefore, recorded as the earliest count known by his name in Bavaria.[205] Now, in Gunther's lifetime, there was a count Grimbert acting in Bavaria;[206] from the list of witnesses in *Notitia Arnonis* count Immino

[197] *Concilium Dingolfingense* 9.
[198] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 143.
[199] Jahn: *Ducatus Baiuvariorum... op. cit.* 256; Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 142.
[200] *Traditio Frisingensis* Nr. 74.
[201] *Notitia Arnonis* 6, 1. 4. 13.
[202] *Breves Notitiae* 14. *tit.*
[203] *Traditio Frisingensis* Nr. 49.
[204] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 156.
[205] *Notitia Arnonis* 6, 24; *Breves Notitiae* 13, 1 sqq.
[206] *Notitia Arnonis* 6, 6; *Breves Notitiae* 14, 4.

and count Eimo[207] and from *Breves Notitiae* count Ugo are also known by name.[208] Count Machelm, who several times granted donations to Bavarian bishoprics and the monasteries of Mondsee and Niederalteiched from his rich estates lying in the region of Traun between the Inn and Salzach in Upper Austria, often emphasised his kinship relations tying him to the duke's dynasty, yet as *comes* Machelm was referred to in sources only with regard to the districts of Mattigau and Rottachgau.[209] There were significant economic differences between counts: accordingly, it is possible to distinguish between *fortis*, *mediocris* and *minor comites*; the counts in the period of the Agilolfings, in addition to their *ministeria*, goods from the duke, disposed of *beneficia* they were granted by the duke.[210] The term *ministerium* highlights the royal, in Bavaria ducal, commission nature of counthood, under which the count discharged military and administrative duties.

The considerable increase in the occurrences of counts and judges in the sources in the period following 741 can be probably attributed to duke Odilo's ruler's programme striving to attain altered, more efficient governance, using methods both seen in the Frankish court and brought along from his home country, Alemannia; yet, in spite of the fact that count Gunther and count Machelm belonged to the duke's most reliable adherents, the existence of an integrated system of counties in the Agilolfings' Bavaria cannot be demonstrated by evidence.[211] *Lex Baiuvariorum* sets forth that a count *(comes)* was responsible for leading *comigatus*, a part of the Bavarian army; and in a non-military function for administering *placita*–then, on the other hand, the territory of competence of the count's jurisdiction is also named *comigatus* in the law, most probably because the inhabitants of this territory constituted the military unit led by the count.[212] The duties assigned to the judges *(iudices)* subject to the count's control, who were required to provide justice and comply with unbribability, were–as set out in *Lex Baiuvariorum*–to appoint dates of administration of law and to implement adjudication, and to carry out certain church administration acts, especially in the event of deeds causing damage to the church.[213]

[207] *Notitia Arnonis* 8, 8.
[208] *Breves Notitiae* 8, 15.
[209] Störmer: *op. cit.* 42 sqq.; *Traditio Pataviensis* Nr. 9.
[210] *Notitia Arnonis* 6, 24; *Breves Notitiae* 13, 10.
[211] Jahn: *Ducatus Baiuvariorum... op. cit.* 260.
[212] *Lex Baiuvariorum* 2, 5. 14.
[213] *Lex Baiuvariorum* 2, 14–18.

Conclusions

Regarding relations between the Franks and Bavarians up to 780, a consistent anti-Carolingian attitude manifested by the Agilolfings cannot be claimed; these relations were determined by the current political constellation; in several cases, the members of the Agilolfing dynasty, e.g., Odilo and Tassilo, were able to take the throne of Bavaria, and make their power firm and stable only with the support of the Franks. As a matter of fact, relations between the Carolingians and Bavarians were not free from rivalry but this had not become fatal for the Bavarian duke before the dethronement of Tassilo III in 788 by Charlemagne. In Bavaria of the 8th c., numerous social processes can be explored and identified set forth in legal formulations that deservedly attract the legal historian's attention: among others the detailed regulation of *status libertatis* and the development of an independent order of nobles. The concept of freedom in German folk law–so in *Lex Baiuvariorum*–might have originally belonged to the scope of the concept of kinship/clan relations. In this case, kinship relations cannot be, of course, construed as blood relations in stricto sensu, much rather a kind of belonging/alliance relations, which might have included, in addition to servants(slaves), the entourage. It was the duke's entourage and the ancient Bavarian *genealogiae* that the Bavarian nobility developed from; their rights were confirmed by Odilo, who obtained the throne of Bavaria with the assistance of the Franks, as it were as his own legitimation; in the period of Tassilo they achieved that these rights and the guarantees thereof were set forth in written form at the Council of Dingolfing. It was at this time that the *adalscalhae* were granted further rights; acting in the duke's service they represented a peculiar Bavarian mixture of servant and noble statuses, and then, upon the termination of the independent Bavarian Dukedom, became in terms of their name free servants, *barscalhae*, and in terms of their status freemen.

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ALBERT TAKÁCS*

Election campaign in the Antiquity**

The volume *"How to Win Elections? Quintus Tullius Cicero: Handbook for Applicants for Offices"* by György Németh and Tamás Nótári[1] and the monograph *"Law, Religion and Rhetoric"* by Tamás Nótári[2] are not only professional works written for jurists of Roman law and historians of the Antiquity. The works of historian György Németh and jurist/philologist Tamás Nótári makes the oldest campaign strategy manual available to readers in Hungarian, and attaches ample commentaries and notes, after word and accompanying study thereto, from which we can develop an exact picture of the election system of the Republic of Rome, the methods of election campaign of the period, the state of facts of election abuses and the sanctions applied to them. All these are issue that may deservedly attract the attention of readers engaged in jurisprudence, interested in public and criminal law.

One of the most famous orators of the Antiquity, Marcus Tullius Cicero entered the election for the *consul's* position held in 64 B.C. arranged under extremely disturbed circumstances and he won the *consulatus* for 63 B.C. Difficulties were caused among others by the fact that an indebted nobleman called Lucius Sergius Catilina saw the only breakthrough for ensuring his

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** The present review is the written version of the presentation of books held in the Reviczky-Castle in Magyarnándor-Kelecsény on the 18th September 2008 organised by the Hungarian Official Journal Publisher.

[1] Hogyan nyerjük meg a választásokat? Quintus Tullius Cicero: A hivatalra pályázók kézikönyve. Fordította, a jegyzeteket, az előszót és az utótanulmányt írta Nótári Tamás. Szerkesztette és a kísérő tanulmányt írta Németh György (How to Win Elections? Quintus Tullius Cicero: Handbook for Applicants for Offices. Translation, preface, notes and after word by Tamás Nótári. Ed. and accompanying study by György Németh). Szeged, Lectum, 2006. 156 pp.

[2] Nótári, T.: *Jog, vallás és retorika* (Law, Religion and Rhetoric). Budapest, Magyar Közlöny Lap és Könyvkiadó, 2008. 356 pp.

political and financial survival in being elected *consul*, and manifested that in case he would lose he would be willing to take as well violent actions (later, he actually carried out his threats). The orator's younger brother, Quintus Tullius Cicero wanted to help his brother in his campaign foreseen as having quite a lot of turns; so, he wrote a manual for him on the lawful and illegal instruments that could be used in the elections. This work, *Commentariolum petitionis (A Handbook for Applicants for Offices)* is the first summary of campaign strategy in the history of mankind. In addition to the evaluation of the given situation, the presentation (and exploitation) of the weaknesses of counter nominees, the book provides advice on several counts that might possibly continue to have relevance even today.

In the opening lines and in the last paragraph of *Commentariolum*, Quintus Tullius Cicero addresses his brother, Marcus in a fairly close, brotherly manner, and at the end of the letter he asks him to share his comments on this writing with a view to adding or correcting things so that later on the work could be made public as a real little manual. Nótári asserts that it is not probable that after Marcus had reviewed and revised it Quintus published this work, in which he outlines the ways of organising and conducting the election campaign since he explores the stages of the fight for votes with merciless frankness. The exploration of uninhibited opportunism and manoeuvring must have been far from being in the interest of the ruling classes in the age of the late phase of the Republic, and especially, it would have put Marcus Tullius Cicero himself in an unpleasant situation–as he would not have been able to remove himself from the suspicion of having won the *consulatus* for no other reason than that he had used all these instruments in practice.

The Republic of Rome recognised four kinds of popular assemblies; three of them played a part in the elections. The so-called *comitia centuriata* based on property *census* elected the prime leaders of the Empire, the *consules* and the *praetores* who carried out administration of justice as well as the *censores* who implemented property estimation. The point of the system was that based on their property status, income the population was ranked among military/political *centuriae*. The *centuriae* of the wealthier as a matter of fact did not amount to one hundred persons while the number of persons in a single *centuria* of the pauper was at least as large as the whole first class; that is, the total of the eighty *centuriae* of the aristocracy. *Equites* constituted eighteen *centuriae*. The wealthier the people recruited were, the higher the number of *centuriae* was; i.e., the number of citizens classified in each *centuria* was steadily increasing when the given *centuria* consisted of less and less wealthy people. Through that it was possible to attain that people without any property were represented only by five *centuriae*.

Elections were held in a process per *centuriae*–and "from up to down". This means that first wealthier people cast their vote and after that the poorer, finally the pauper, who constituted the major part of the population. Although the ballots cast by each citizen were equal but their ballots were aggregated per *centuria* and their *centuria* eventually represented only a single 'yes' or 'no' vote, depending on which response the majority of the ballots was cast in the *centuria*. If a case had to be decided or an official had to be voted for, voting was carried out only up to the stage where the *centuriae* that had already cast their vote had reached fifty percent plus one ballot. As the eighty votes of the eighteen votes of the *equites* and the eighty votes of the first class of the patricians/the aristocracy themselves were more than half of the one hundred and ninety-three *centuriae* in total, it can be clearly realised that even the twenty *centuriae* of the second property class had to cast their ballots only in the very rare case that the *centuriae* of the knights and the first class had not reached accord for some reason. As, however, the first ninety-eight *centuriae* actually represented merely a fraction of the whole of the citizens, the election was far from reflecting the will of the majority of the citizens.

The day of the election of the consuls always fell on the second half of July. The electors went out to the Mars field early morning and gathered by *centuriae*. The persons controlling the elections announced the names of the candidates; and, after that voting began. The identity of the voters appearing per *centuriae* was verified by the guards at the gateway to the voting bridge. Voters wrote the initials of the name of the candidate they supported on a wax covered piece of wooden board. At the other end of the voting bridge a ballot-box was set up where they cast their boards. Once one *centuria* has cast their votes, ballots were aggregated in the ballot counting chamber, and the names of the candidates were written in a predetermined order, with the decisions of the *centuriae* added beside the names. When a candidate had reached fifty percent plus one vote of the ballots of the *centuriae*, voting was discontinued, and the result was proclaimed.

The institution of campaign silence was unknown to the Romans since agents tried to convince voters to vote for specific candidates even at the gate of the bridge. If it was foreseen that the result would be unfavourable for patricians, then the voting bridge collapsed "accidentally", and the voting had to be interrupted–and be postponed for several days. Then, in some cases, *augures* showed up, who stated that they were seeing ill *omina*, and this allowed declaring the whole procedure null and void.

As a matter of fact, it was much easier to influence voters efficiently during the campaign. Election announcements are still available to us–painted on the plaster of the walls in Pompeii that have been preserved by volcanic ash and

lava. These announcements were produced by a special branch of industry; first white washers worked, who primed the wall; then, scriveners painted the text of the announcement on the "poster prime". Sometimes they initialled these announcements, and it can be known from this that often the same advertising company offered its services to two opposing parties. Election "posters" include items with both positive and negative content.

The person who summed up campaign strategy for the first time was Quintus Tullius Cicero, the younger brother of the famous orator who summed up his advice in his work *Commentariolum petitionis* in 64 B.C., which were then addressed to Marcus Cicero, who applied for the position of *consul*, i.e., the highest state office. In addition to the evaluation of the given situation, presentation (exploitation) of the weaknesses of the opponents, the book provides advice on several counts, which possibly continue to have relevance even today.

The first thing he advised was to determine the strategic objective exactly: he should think it over in what state he was living; what he was applying for; and in what situation he was. It is important in the advice that the candidate–in this case Marcus Tullius Cicero–should rely on his young students since, in Quintus's view, the election will be won by the candidate who manages to get youth to stand by him, and he should build on everybody whom he had successfully defended in court as an advocate. He provided advice also on how to discredit political opponents: one of them had purchased his mistress on a slave market, the other was living in an incestuous relation with his own elder sister and had had noble knights killed. Even if all this was not completely true, it served to compromise them.

Even more important than discrediting opponents is to win as many friends as possible. It is important to appear in the company of popular people, even if they do not support the candidate since those who can see them together will not necessarily know that. Quintus lists three kinds of ways of how to arouse sympathy: when one does good to somebody; when people hope that we will do good to them, or when people likes us. One should send the message to the friends of our friends that one will not be ungrateful if they support us. One should promise them offices since the worst that could happen is that we might possibly not keep our promise once having won the consul's office. The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name. "Village folks–writes Quintus cynically–will immediately imagine themselves our friends if we know their name."

It is important to appear in the company of popular people, even if they do not support the candidate since those who can see them together will not necessarily know that. Quintus lists three kinds of ways of how to arouse

sympathy: when one does a favour to somebody; when people hope that we will do a favour to them, or when people likes us. One should send the message to the friends of our friends that one will not be ungrateful if they support us. One should promise them offices since the worst that could happen is that we might possibly not keep our promise once having won the consul's office. Quintus asserts that a candidate should keep the map of entire Italy in his mind so that there should be no village where he has no sufficient support. Each electoral district should be covered by a web of friendly relations. The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name. However, so many names to keep in mind is an impossible task for anybody. To this end, *nomeclatores* (name reminders) were used, who whispered who was who into one's ears. In Quintus Cicero's view, to contact those who are hesitating between political sides three things are needed: generosity, attention and, occasionally, some pretension and flattery, "since a candidate should every time adjust to those whom he just meets." One should let everybody to have access to him day and night; everybody should be helped; or at least one's help should be promised but all this in such manner that one does not hurt self-esteem of those whom one helps.

From all this it can deduced–in spite of Quintus Cicero not uttering it word for word–that in order to obtain the given office a candidate should not be afraid of using any tricks, making false promises, telling lies, using pretension and getting close to the group that seems appropriate for the purpose.

After analysing the campaign strategy, Nótári returns to the state of facts of election fraud/bribery, the so-called *ambitus*, and demonstrates that as early as after the Twelve Table Law it was sanctioned if candidates called voters' attention to themselves by wearing specially whitened clothes. There must have been little effect produced by this provision since it is on the grounds of whitened clothes, the *toga candida* that nominees are still called candidates *(candidati).* In the Roman terminology only *ambitus* was in conflict with law; whereas *ambitio* (winning voters' mercies through ways that can be considered unacceptable in terms of ethic but not in terms of law) did not. This was often applied as a term interpreted as the act of obtaining votes; its meaning was sometimes undoubtedly pejorative but it had never become a legal technical term–the borderline between the two terms, however, was never clear cut. Later, laws punished candidates who violated the fairness of the elections by being exiled, imposing a fine and losing the right of being elected; so, for example, actual bribery, holding large feasts, distributing complimentary tickets to theatre performances and gladiators' games, etc. The author, however, might be right when having analysed several cases he asserts that the actual limits of election abuses were restricted only by the financial possibilities of candidates.

We do not know to what extent the experienced politician, Cicero adhered to his younger brother's advice; it is, however, a fact that he was elected *consul*, and as a *consul* he defeated Catilina's revolt in. 63 B.C. This volume is interesting not only for historian of the Antiquity and jurists of Roman law since the work written with profound scientific erudition and the precise translation conveys the picture of a colourful world exciting to people of the present day. Finally, to illustrate this, a few sentences from the election advice, campaign tricks provided by Quintus Tullius Cicero, also quoted in the dust jacket comments of the volume, follow: "*People living in the provinces and village folks will immediately imagine that they are our friends if we know their name. – Acquire the skill that is not yours from nature: you should pretend to make your acts appear natural!* – (The candidate) *should shape and adjust his countenance, look and speech to the way of thinking and will of all those whom he meets. – Do not let that there should be a single provincial town, a single settlement, a single local authority or any place where you do not have sufficient support! You must have a plan that covers the whole town, each territory, district and neighbourhood! – Attain that your* (competitors) *should know that you supervise and watch them! – Make sure that the whole procedure of candidacy should be pompous, bright, gleaming and kind to the people, and should be fairly striking, ... and that the sentence condemning the way of life of your competitors should be spread! – Attain that all those who you hold in your hands as people committed to you, should have tasks clearly determined and allocated! – In the procedure of candidacy special attention must be paid to achieving that the State should entertain good hopes and respectful opinion towards you; yet, you must not appear to be ... thirsty of power. – And the masses should think that you will work for their benefit!*"

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VANDA LAMM*

Rethinking the Non-Proliferation of Nuclear Weapons

Abstract. The article aims to assess the effectiveness of the non-proliferation regime established more than 40 years ago with the adoption of the Treaty on the Non-proliferation of Nuclear Weapons (NPT). Since that time the international community had achieved considerable success in the prevention of nuclear weapons' proliferation. Nevertheless, while noting the results of the NPT and the verification system established under that instrument, one cannot remain silent about the shortcomings of the system and the non-compliance with some of its provisions. By its structure and provisions the NPT has divided States into two groups, distinguishing those possessing and those not possessing nuclear weapons. In effect, the rights and obligations of the Contracting Parties to the NPT are tailored to the group to which they belong, and the gravest violation of the NPT is that when States seek to change their status as defined in the NPT, notably by trying to munfacture or control of nuclear weapons. Under the NPT, research in, production and application of nuclear energy for peaceful purposes are inalienable rights, but their exercise should be in keeping with the basic obligation of non-nuclear-weapon States under the Treaty not to acquire in any form nuclear weapons and not to carry out unauthorized nuclear activities under the guise of their peaceful nuclear programs. While emphasizing the need to strengthen the non-proliferation regime, the article describes in nutshell the nuclear program of two States (the Islamic Republic of Iran and the Democratic People's Republic of Korea) which gave cause for serious international concern.

Keywords: Treaty on the Non-proliferation of Nuclear Weapons (NPT), nuclear weapons proliferation, peaceful utilization of nuclear energy, nuclear-free zones, International Atomic Energy Agency, safeguards, nuclear export, KEDO, Nuclear Suppliers Group, India, Islamic Republic of Iran, Democratic People's Republic of Korea

More than four decades ago that on the 12th June 1968 the United Nations General Assembly, by its resolution 2373 (1968), adopted with a vast majority the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which was the result of more than ten years' negotiations in the United Nations and in the Conference of the Eighteen-Nation Committee on Disarmament.[1]

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[1] The solemn singing of the Treaty took place simultaneously in London, Moscow and Washington on 1 July 1968, and the instrument entered into force on 5 March 1970.

This instrument, by which the international community tried to prevent the world-wide spread of nuclear weapons and sought to remove, at long term, this destructive device from the arsenals of States, has been regarded as one of the most important disarmament agreements down to our times. The main purpose of the Treaty was to halt all direct and indirect forms of access of nuclear weapons and nuclear explosive devises by those States which do not possessed them at the time of the conclusion of the Treaty.[2]

Subject to the remark that the cause of nuclear disarmament cannot be judged from the operation of a single instrument, it may be stated that since the entry into force of the NPT there has been made significant progress towards achieving the objectives the Treaty.

According to some estimates, there would be 30 to 40 nuclear-weapon States today had the Non-Proliferation Treaty not been concluded.[3] Unfortunately, however, the number of *de facto* nuclear-weapon States has grown despite the NPT. These States include India and Pakistan, which carried out nuclear test explosions in 1998,[4] and the Democratic People's Republic of Korea (DPRK, North Korea), which in October 2006 informed world public of having carried out an underground nuclear explosion. Other States, which will be discussed at a later stage, are but supposed to be secretly working on nuclear weapons programs.[5] In our days there are virtually 9 nuclear-weapon States, namely the 5 nuclear powers as well as India, Pakistan, Israel and DPRK, with none of the latter being a party to the NPT.[6] It is worth mentioning that to this very day

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In our days there is a voluminous literature on the Treaty. Of these publications see in particular Willrich, M.: *Non-Proliferation Treaty: Framework for Nuclear Arms Control.* Charlottesville, Virginia, 1969; Fischer, G.: *The Non-Proliferation of Nuclear Weapons.* London, 1971; Bellany, I.–Blacker, C. D.–Gallacher, J. (eds.): *The Nuclear Non-Proliferation Treaty.* London, 1985; Delcoigne, G.–Rubinstein, G.: *Non-Proliferation des armes nucléaires.* Editions de l'Institut de Sociologie, Bruxelles, 1970.

[2] Under Art. 9, Para. 3, of the NPT "For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967.".

[3] Cf. Timerbaev, R.: What next for the NPT? Facing the Noment of Truth. *IAEA Bulletin,* 46 (2005) No. 2, 4.

[4] In May 1998 both States carried out a series of 5 nuclear test explosions each and both Governments announced their undertaking a voluntary moratorium on further explosions. On the test explosions by India and Pakistan, see Kile, S.: Nuclear Arms Control and non-proliferation. *SIPRI Yearbook 1999. Armament, Disarmament and International Security.* Oxford, 1999. 520–522.

[5] Iran, Israel and Libya are usually referred to as such States.

[6] The nuclear warheads possessed by India, Pakistan, North Korea and Israel number 70 to 120, 30 to 80, 1 to 10, and 75 to 200 respectively. Cf. www.uspw.org.

South Africa is the only State which had formerly possessed nuclear weapons but voluntary gave up its nuclear arms. In the 1980s the racist regime of South Africa has developed nuclear weapons, but all of these weapons were dismantled in the early 1990s.[7]

It can be claimed as a success by any measure that the NPT, which was originally adopted for a term of 25 years, was extended indefinitely and without condition at the Fifth Review and Extension Conference of 1995 by virtue of Art. X. Para. 2, of the NPT.[8] Further progress is marked by the fact that today 188 States are party to the Treaty, with all nuclear powers having adhered to the NPT, for the original signatories to the Treaty did not include two nuclear-weapon States, France and China. Precisely for this reason, the accession of China on 9 March 1992 and then of France on 2 August of that year were events of great importance to the prevention of the proliferation of nuclear weapons. The effectiveness of the NPT regime is further evidenced by hundreds of on-site inspections executed annually by the International Atomic Energy Agency (IAEA) by way of verification of the fulfilment of the treaty

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A known view claims that in the absence of the NPT nuclear weapons would today be possessed by Argentina, Australia, Belorussia, Brazil, Canada, Egypt, Germany, Indonesia, Japan, Kazakhstan, Netherlands, Norway, Romania, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan and Ukraine, as well as former Yugoslavia along with the 9 States mentioned above. Cf. Bunn, G.: The world's Non-Proliferation Regime in Time. *IAEA Bulletin*, 46 (2005) No. 2. 8.

[7] South Africa acceded to the NPT in 1991, and until the end of 1992 the IAEA conducted inspections at 75 sites in the country, one at a dismantled uranium-enriching unit and one in a desert region where nuclear tests had been carried out previously.

[8] See resolution No. 3 adopted at the Fifth Conference on the Review and Extension of the NPT. *United Nations Disarmament Yearbook, 1995.* 27–28.

Review conferences are provided for by the NPT in Para. 3 of Art. VIII, under which on expiry of 5 years from the entry into force of the Treaty the implementation thereof is to be reviewed by a conference and at 5-year periods. Thereafter the majority of the States parties may request the convening of more such conferences. Review conferences were held on that basis in 1975, 1980, 1985, 1990, 1995, 2000 and 2005.

Extension of the term of the Treaty is covered by Para. 2 of Art. X, stating that, by the lapse of 25 years from the entry into force of the Treaty, a conference is to decide whether the NPT should continue in force for an unspecified term, or its operation should be prolonged for a specified term or for further specified terms.

On the Review and Extension Conference of 1995, see Simpson, J.: The nuclear non-proliferation regime after the NPT Review and Extension Conference. *SIPRI Yearbook 1996. Armaments, Disarmament and International Security.* Oxford, 1996. 561–573.

obligations of non-nuclear-weapon States,[9] as well as by the comprehensive safeguards agreements which the Agency has concluded with 82 States.[10]

I. Criticisms levelled at the NPT

Nevertheless, while noting the results of the NPT and its system of verification, one cannot remain silent about the fact that ever since its adoption the Treaty has received several criticisms partly for its deficiencies, partly for non-compliance with some of its provisions. In what follows I wish to single out but a few of them.

a) The nuclear disarmament

One of the objections most frequently raised in connection with the NPT concerns the fact that the instrument, apart from the provisions of the Preamble thereto, refers to disarmament in a single provision (Art. VI.), spelling out that

> "Each Party to this Treaty undertakes to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament as well as to a treaty on general and complete disarmament under strict and effective international control".

The cited provision is undoubtedly formulated in rather general terms, and, although nuclear disarmament is to be expected primarily from the nuclear-weapon States (since, after the entry into force of the instrument, such weapons

[9] In virtue of Art. III. of the Non-proliferation Treaty the fulfilment of the obligations undertaken by the non-nuclear-weapon States party to the Treaty is to be verified by the IAEA applying its safeguards system. Under Para. 1 of Art. X, non-nuclear-weapon States are required to subject all their peaceful nuclear activities to the IAEA safeguards.

On this score see Cooley, J. N.: International Atomic Energy Agency Safeguards under the Treaty on the Non-Proliferation of Nuclear Weapons: Challenges in Implementation. In: Avenhaus, R.–Kyriakopoulos, N.–Richard, M.–Stein, G. (eds.): *Verifying Treaty Compliance.* Berlin-Heidelberg, 2006. 61–76.

[10] A review of the IAEA safeguards system had become necessary by the 1990s. In order to strengthen the system and to increase its efficiency, the Agency prepared in 1997 a supplementary model protocol on the safeguards agreements (see IAEA INFCIRS/540). On the model protocol see Priest, J.–Rockwood, L.: Protocols for Strengthened Safeguards: Progress and Prospects. *IAEA Bulletin,* 41 (1999) No. 4. 14–23.

may only be possessed by those States), the NPT makes it an obligation of all Contracting Parties to pursue negotiations in good faith.

A great shortcoming of the NPT consists in containing no further provisions on such negotiations, failing as it does to indicate a deadline for commencing negotiations or a date, if only an approximate one, for the destruction of the world's nuclear arsenal.

As regards the Treaty's provisions on nuclear disarmament talks, it is worth while to note that the International Court of Justice, in its advisory opinion of 1996 on the *Legality of the threat or use of nuclear weapons*, made a special point of Art. VI. of the NPT, emphasizing that the said Art. provides not only for the conduct of negotiations, but also for the need for such negotiations "to achieve a precise result–nuclear disarmament in all its aspects". In the Court's view this twofold obligation applies to all parties to the Treaty, i.e. to the overwhelming majority of the international community (at the time the advisory opinion was rendered there were 182 States party to the NPT).[11] An insufficiency of the advisory opinion, as Matheson points out, that it "does not dictate any timetable or negotiating forum for reaching this result".[12] For that matter, Richard A. Falk notes on the advisory opinion that the Court has certainly created a clear situation with respect to the future: "either a specific prohibition of nuclear weapons or nuclear disarmament".[13]

There is no doubt that the past four decades have witnessed considerable step forward with respect to nuclear disarmament. However, the NPT provisions on nuclear disarmament have only been implemented in part, albeit the one-time Soviet Union, or Russia and the United States have signed highly important agreements on the limitation of nuclear weapons[14] and there have been cuts in the number of nuclear weapons possessed by the United States and Russia.[15]

[11] Cf. *Legality of the Threat or Use of Nuclear Weapons.* Advisory Opinion, 8 July 1996. *I.C.J. Reports,* 1966. 263–264.

[12] Cf. Matheson, M. J.: The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons. *American Journal of International Law,* 91 (1997) 434.

[13] Falk, R. A.: Nuclear Weapons, International Law and the World Court: A Historic Encounter. *American Journal of International Law,* 91 (1997) 75.

[14] See the Strategic Arms Limitation Talks (commonly known as SALT I) which resulted in the conclusion of the 1972 Anti-Ballistic Missile (ABM) Treaty and the SALT II in 1972. One should mention also the Strategic Arms Reduction Talks (START) started in 1982.

[15] On the Soviet-American agreements see Smith, S.: US-Soviet Strategic Nuclear Arms Control. From SALT to START to STOP. *The Nuclear Non-Proliferation Treaty, op. cit.*, 49–74.

Apart from all these results, however, the number of nuclear warheads existing in the world today can be put at 13.000, of which 11.000 are possessed by the United States and Russia.[16]

The fact that international agreements have by now established nuclear-weapons-free zones in different parts of the globe can be seen as an important step towards nuclear disarmament. The signing of these treaties is closely interrelated whit the NPT, all the more so since Art. VII. of the NPT specifically refers to nuclear-weapons-free zones in providing that

> "Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."

It is due to all this that one can speak, on the one hand, of certain zones not belonging to any State like Antarctica, outer space and the sea-bed as being free from nuclear weapons and, on the other, of the establishment of regional nuclear-weapons-free zones in Latin America (Treaty of Tlatelolco, 1967) and in the South Pacific Region (Treaty of Rarotonga, 1985), in South-East Asia (Treaty of Bangkok, 1995), in Africa (Treaty of Pelindaba, 1996), and recently in Central Asia (Treaty of Semipalatinsk, 2006).

In the 1990s an outstanding event in the field of nuclear disarmament was the opening of the Comprehensive Nuclear Test-Ban Treaty (CTBT) for signature at New York on 24 September 1996. However, the CTBT has not entered into force to this very day, although it was signed by 180 and ratified by 148 States. This delay in entry into force can be ascribed to the fact that certain States, on whose accession the operation of the Treaty is conditional; have not yet ratified the instrument.[17] These States include two nuclear powers (the United States and China) and several States which, though not deemed to be nuclear-weapon State by the terms of the NPT, have conducted nuclear test explosions or are capable of doing so.[18] The cause of nuclear disarmament is greatly prejudiced by these States' reluctance to ratify the CTBT, although a reference to nuclear disarmament is also found in the Preamble of the NPT to the effect that the

[16] Cf. Kile, S. N.–Fechenko, V.–Kristensen, H. M: World Nuclear Forces, 2006. *SIPRI Yearbook 2006. Armaments, Disarmament and International Security.* Oxford, 2006. 644.

[17] Under its Art. XIV, the Comprehensive Nuclear Test Ban Treaty is to enter into force 180 days after its signature and ratification by 44 States as enumerated in Annex 2. Until August 2008 the Treaty was ratified by 35 out of the 44 States.

[18] Among those States, mention may be made of Egypt, India, Iran, Israel, North Korea and Pakistan.

Parties to the Treaty "Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."

However, all these international instruments mentioned above could not hid the fact that there is no result in the conclusion of a convention on the prohibition of the use of nuclear weapons under any circumstances, although the question of nuclear disarmament was on the agenda of the General Assembly and the Conference on Disarmament of Geneva since the beginning of the 1980s.

The only international instrument connected with nuclear weapons concluded in the post-Cold War era was the International Convention for the Suppression of Acts of Nuclear Terrorism in 2005.[19] The making of that instrument was necessiteted by the threat that terror agents can construct or acquire nuclear weapons, or they might built "dirty bombs", and by the fear that nuclear installations could be the target of terrorist groups' attack.[20]

b) Discriminatory character of the NPT

Already from the beginning the NPT was challenged of being discriminatory, pointing out that the Treaty creates unequal obligations for States and distinguishes between the Contracting Parties according to whether in 1967 they were qualified as nuclear-weapon States or non-nuclear-weapon States.[21] The underlying reason of that argument being that whereas the freedom of action of the non-nuclear-weapon States is greatly restricted by the Treaty, the same does not hold for the nuclear-weapon States. Precisely on this ground it is maintained by many that "the NPT starts to appear as a device for freezing the world power structure".[22]

This claim is absolutely true in so far as the NPT required the non-nuclear-weapon States to renounce acquisition in any form of nuclear weapons and nuclear explosive devices, but it did not do so in respect of the nuclear-weapon

[19] The Convention on Nuclear Terrorism entered into force on July 7, 2007.

[20] On the Convention on Nuclear Terrorism see Joyner, C. C.: Countering Nuclear Terrorism: A Conventional Response. *European Journal of International Law*, 18 (2007) 225–251.

[21] According to Art. IX. Para, 3.

"For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967".

E.g. India refused to accede to the Treaty by invoking its discriminative character.

[22] Cf. Simpson, J.: The Non-Proliferation Treaty at its Half-Life. *The Nuclear Non-Proliferation Treaty. op. cit.* 6.

States. It should nevertheless be stressed that, since complete nuclear disarmament is by all means the long-term objective–notably the desideratum to remove this destructive type of weapons from the arsenals of States–, there is perhaps a hopeful possibility that mankind will some time come to see that such weapons are not possessed by the nuclear-weapon States either.

It is indisputable that the NPT differentiates between the Contracting Parties by dividing them to nuclear-weapon States and to non-nuclear-weapon States. Most of the rights and obligations of the States Party to the Treaty depend on their status under the Treaty i.e. whether they have the right to posses nuclear weapons and nuclear explosive devices, or this is forbidden to them. In that perspective their is an inequality between the Contracting Parties, five of them have the right to posses nuclear weapons or nuclear explosive devices and all the other Contracting Parties are so called non-nuclear weapon States which had to renounce the possession of these weapons and devices and had to submit all their peaceful nuclear activities to the safeguards system of the International Atomic Energy Agency.[23]

However, John Simpson is right in poining out on this score that the Treaty's "discriminative" character and the freeze imposed by it on the existing world power structure "do not appear to outweigh the particular security advantages offered by the NPT".[24]

It should be stressed that the Treaty intends to keep the above mentioned inequality in certain limits and it tries, especially in the field of the peaceful utilization of nuclear energy, to compensate by the provisions on the cooperation in the peaceful uses of nuclear energy.

c) The withdrawal of the Treaty

The decades which have passed since the conclusion of the Non-Proliferation Treaty have proved that the instrument's provision on withdrawal is a weakness thereof, namely the fact that the Treaty may be denounced through a rather simple procedure, a State leaving with relative ease the regime which has been designed to prevent the spread of nuclear weapons.

[23] Under Art. III. the International Atomic Energy Agency has to apply its safeguard system to all nuclear activities of the non-nuclear-weapon States Party to the NPT in order to verify the fulfilment of their obligations assumed in the Treaty with a view of preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices.

[24] Simpson: *op.cit.* 6.

Art. X. Para. 1, of the Treaty runs as follows:

> "Each Party shall in exercising its national sovereignty have the right to withadraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

As is noted by Jozef Goldblat, the problem with this provision lies in the State itself being entitled to decide on the existence of "extraordinary events", on whether such events have cocurred at all, the State being under no obligation to justify its action. Furthermore, the kind of extraordinary event the drafters had in mind–other than that the acquisition of nuclear weapons by a potential adversary–is not clear from wording of the Treaty.[25] Fortunately, during the past 40 years, the NPT was denounced by one State only, DPRK,[26] but at the same time threats to denuonce it were also voiced by other State (e. g. Iran) as well.

Another problem with the provisions on withrawal of the NPT is that if a non-nuclear-weapon State chooses to denounce the Treaty, that is, it leaves the NPT regime, the international community ceases to have any information about the purpose for which that State, once free from its obligations under the NPT, intends to use the nuclear materials it posses and the technical knowledge it has acquired as a party to the Treaty. This is all the more so since the safeguards agreements on IAEA control will also remain in force until such time as the State concerned is a party to the NPT. Thus, in the last analysis, the international community is exposed to the danger that the denouncing State will undermine the non-proliferation regime as a whole.

Eventual withdrawal from the NPT by a State or States might produce a highly dangerous domino effect in the sense that eventually other States will reconsider their participation in the NPT. Especially because States have undertaken their non-proliferation obligations in respect to each other or to one another is likely to come into play in the case of the NPT more strongly than in

[25] Goldblat, J.: *Arms Control. A Guide to Negotiations and Agreements.* PRIO. International Peace and Research Institute. Oslo, 1994. 82.

[26] In March 1993 North Korea announced its intention to leave the NPT and then, in June of the same year, it suspended the execution of its withdrawal. Yet, with effect from 11 January 2003, it definitely denounced the NPT. We shall revert to the case of North Korea later on.

that of any other treaty. Considering that a State not possessing nuclear weapons has renounced acquisition, possession, etc. of such weapons in the hope that other States not possessing nuclear weapons will undertake similar obligations, and it would certainly like to receive a guarantee that nuclear weapons will not be used against it. It will be remarked, parenthetically, that the fears of States about the eventual use of nuclear weapons are but increased to some extent by the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* since the Court failed to give a definite answer "as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake".[27]

Obviously, any effort to prescribe stricter rules on withdrawal from the NPT would raise a whole range of legal and political issues. At the same time, however, one must not overlook the fact that the provisions on withdrawal were formulated at the time when the success of the NPT regime was far from sure. It was not by chance that the instrument was originally concluded for 25 years, with a decision on the extension of the Treaty following the expiry of that term. At the time of conclusion it was not possible to know how the first 25 years of the Treaty's life would shape up and what would happen in international politics during that period. Precisely for that reason, the possible solutions after the first 25 years were articulated in advance. In other words, it was laid down in the Treaty itself that by the lapse of 25 years a decision may be made as to whether (i) to keep the Treaty in effect indefinitely, or (ii) to extend for an additional fixed period or periods.[28] These provisions were by all means intended to rule out the possibility to terminate the Treaty after the lapse of 25 years.

However, the four decades since the conclusion of the NPT have proved to the viability of the regime as well as to the fact that the overwhelming majority of the States does make serious efforts to prevent the world-wide proliferation of nuclear weapons. This is borne out by 188 contracting States to the NPT and by the indefinite extension of the Treaty at the Fifth Review and Extension Conference.

As can be seen, the Non-Proliferation Treaty has by our days become a treaty with indifinite duration and is one of the multilateral international instruments of whose importance and necessity the international community of the States is

[27] Cf. *Legality of the Treat or Use of Nuclear Weapons.* Advisory Opinion, 8 July 1996. *I.C.J. Reports,* 1996. 263.

On the Advisory Opinion see Matheson: *op. cit.* 417–435.

[28] Cf. Art. X. Para. 2, of the NPT.

earnestly convinced. All this naturally leads one to ask whether mankind has by now reached the state at which to make the NPT obligations everlasting, keeping in mind the final object of the complete nuclear disarmament. To restrict in some form the withdrawal from the NPT can be conceived of as a first step towards this goals.

Restiricting the withrawal from a treaty is not unknown to international law at all. Typical instances are the conventions on humanitarian law, but also worth noting is the 1997 Convention on the Prohibition of the Use, Stockpilling, Production and Transfer of Anti-Personal Mines and on their Destruction (Ottawa Treaty), providing in Art. XX. that the "instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal" and that if during the six months of notice of withdrawal "the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict." Incidentally, publicists have recorded treaties which by their very nature are unlikely to be capable of withdrawal are treaties of peace, disarmement and those establishing permanenet regimes, such as for the Suez Canal.[29]

It would obviously be not easy to amend the NPT in the direction of prescribing stricter conditions for withdrawal, yet this question should also certainly be addressed, and it could be on the agenda of the next NPT Review Conference to be held in 2010.

II. The inalienable right to develop, research, production and use of nuclear energy for peaceful purposes

Since the first attempts to restrict the possession of nuclear weapons by certain States it was a long debated question how to reconcile these restrictions with the peaceful utilization and development of nuclear energy. In other words, how to assure the peaceful utilization and development of nuclear energy in those States which will renounce of any possession of nuclear weapons. That problem arose because according to a number of States the restrictions on the possession of nuclear weapons influence or even hamper the peaceful utilization and development of nuclear energy.

Knowing that was not surprising that in the 1960s during the talks on the prevention of the proliferation of nuclear weapons, it was a key-issue how to secure the progress of peaceful nuclear industry in States giving up the possession of nuclear weapons, and should they get some reward for that.

[29] Cf. Aust, A.: *Modern Treaty Law and Practice.* Cambridge, 2002. 234.

At the Geneva talks several delegations tried to present the development of the peaceful nuclear industry in such a way as being dependent to the possession of nuclear weapons. Needless to say that this is totally misinterpretation of the development of nuclear industry in the middle of the 20th century. It is true that the progress of peaceful nuclear industry was stick to the manufacturing of nuclear weapons; or even one can say that the peaceful nuclear industry was to some extent the by-product of the military nuclear industry. But this was due first of all to the military and political situation at end and after the Second World War. The States spent billion of dollars, roubles or pounds to the research works connected to nuclear weapons and as a consequence the nuclear weapon industry developed considerably and also the knowledge on the possibilities of the peaceful utilization of nuclear materials evolved. But if these huge amounts of money were to be spent only to the development of the peaceful nuclear industry, the progress would be the same, as the example of several States without nuclear weapons capacity show to us. One can say that there is no direct connection between the possession of nuclear weapons and the peaceful utilization of nuclear energy. A State could have very developed peaceful nuclear industry without the possession of nuclear weapons. In that connection one can refer to Canada, Germany, and other States as well.

During the negotiations on the NPT a number of small and medium-size non-nuclear-weapon States, in return to undertake not to get any possession and acquisition of nuclear weapons advocated to receive certain compensation and promises for greater cooperation in the field of peaceful uses of nuclear energy.

After long debates two sets of provisions were included in the NPT,[30] both of them giving guarantees to the non-nuclear-weapon States to have access to the benefits of the peaceful utilization of nuclear energy.

The first set of these provisions are in the Preamble and Art. IV. securing the right to all parties to the Treaty to develop research, produce and use of nuclear energy. The other guarantees are included also in the Preamble and Art. V. of the Treaty providing on the sharing of non-nuclear-weapon States in the benefits from any peaceful applications of nuclear explosions.

The detailed provisions on the share of the non-nuclear-weapon States in the benefits of these explosions are the consequence of the fact that explosive devices used for peaceful nuclear explosions are the same as those built in nuclear weapons, and therefore the Treaty prohibits any kind of acquisition of these devises to non-nuclear-weapon States.

[30] It is worth mentioning that the American and Russian drafts of 1965 and 1966, contained no provisions on the peaceful use of nuclear energy.

The other reason was that at the time of the conclusion of the NPT there were great hopes in the utilisation of peaceful nuclear explosions in the extraction of mineral resources, construction of canals, tunnels, etc. Therefore the non-nuclear-weapon States had real fearing that by their accession to the NPT they would renounce to utilise that very important tool of civil engineering.

a) The "inalienable right" is not an unlimited right

As it was mentioned before, on the wish of the non-nuclear-weapon States, in the Preamble and in Art. IV. special clauses were included in the NPT on the right of these States to the peaceful uses of nuclear energy. In Para. 1, of Art. IV, the right to the peaceful uses of nuclear energy was formulated by a so called interpretative provision,[31] which says that

> "Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I. and II. of this Treaty".

According to writers of international law this kind of interpretative provision aims to exclude a certain interpretation given to a treaty, creating a clear situation and prohibiting an otherwise possible interpretation.[32]

Speaking on the right of non-nuclear weapon States to the peaceful uses, development, research of nuclear energy, the NPT qualifies that right as *"inalienable"*, which means that the non-nuclear-weapon States could not be deprived of this right or this right is not capable of being taken away.

As we could see the inalienable right to the peaceful uses of nuclear energy is subject of two limitations: namely, that right should exist without discrimination and this right is not unlimited and it is subordinated to Art.s I, and II, containing the basic undertakings to prevent the dissemination of nuclear weapons.

The inalienable right to the peaceful uses of nuclear energy is not an unlimited right. Para. 1, of Art. IV, makes clear that the right to the peaceful uses of nuclear energy should be "in conformity with Articles I. and II. of this

[31] This technique is well known in international treaty practice and e.g. one can find similar provision in Art. IV. Para. 1. of the Antarctic Treaty.

[32] Cf. Haraszti, G.: *A nemzetközi szerződések értelmezésének alapvető kérdései* (Basic problems of the interpretation of international treaties). Budapest, 1965. 88.

Treaty". Thus under Art. IV. the non-nuclear-weapon States' right to develop research, production and use of nuclear energy for peaceful purposes is secondary to the fundamental obligations accepted by all the Contracting Parties with regard to the prevention of the proliferation of nuclear weapons and to the *fundamental purpose of the Treaty to halt the dissemination of nuclear weapons.* The right to develop research, production etc. of nuclear energy could not serve to the evasion of the basic commitment of the non-nuclear weapons States under the Treaty, not to acquire in any form nuclear weapons or nuclear explosive devises and the development, research, production and use of nuclear energy *could not lead to the violation of the basic provisions of the Treaty.* The subordination of the right to peaceful uses of nuclear energy to Art.s I, and II, indicates, that no kind of peaceful nuclear activity could be tolerated which result in any form of the production or acquisition of nuclear weapons or nuclear explosive devices by the non-nuclear weapons States.

Since the entry into force of the NPT the right to the peaceful utilization of nuclear energy and the interpretation given to Art. IV, of the NPT was dealt by numerous international conferences, forums etc, and among others it was on the agenda of the NPT review conferences, which has special importance in that respect since the task of these conferences is, according to Para. 3 of Art. VIII., to review the operation of the Treaty "with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized."

One can say that all review conferences strongly reaffirmed the right of all parties to the NPT to develop research, to produce and to use nuclear energy for peaceful purposes.[33]

b) International cooperation

Para. 2, of Art. IV, treats the international cooperation in the peaceful uses of nuclear energy. The first sentence of that paragraph provides that

> "All the parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and

[33] See Decision 2 adopted at the Fifth Review and Extension Conference, on "Principles and objectives for nuclear non-proliferation and disarmament", Para. 14. *Ibid.* 26. In 2000 the Sixth Review Conference not only reaffirmed the inalienable right of all parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Art.s I.–III. of the Treaty, but even it adopted a decision in which the Conference recognized "that this right constituted one of the fundamental objectives of the Treaty". Cf. Part I, and II. p. 8. Para 2.

scientific and technological information for the peaceful uses of nuclear energy."

Thus according to this sentence all parties to the Treaty should facilitate the exchange of information etc. although as we know, not all the Contracting Parties were at the time of the conclusion of the Treaty or even now-a-days in a position to do that. The second sentence of that paragraph regarding international cooperation is more precise because it refers only to those parties to the Treaty which are in an appropriate position (under the Treaty: "which are in a position to do so") and these States should co-operate in contributing "to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the need of the developing areas of the world".

Thus in connection with the international cooperation the Treaty expressly says that in the course of international cooperation the Parties should take into consideration the demand of developing areas of the world.

The co-operation in contributing to the further development of the application of nuclear energy could be executed by States Party alone or together with other States or international organizations, which gives broad discretion to the States Party and creates new perspectives for the development of international co-operation in the peaceful uses of nuclear energy. And, as the Third Review Conference stressed, international co-operation in the peaceful uses of nuclear energy could contribute to the elimination of technological and economic differences between the developed and developing countries.[34]

By comparing the provisions on the exchange of information and cooperation regarding to develop research, production and use of nuclear energy for peaceful purposes (Art. IV.) with those concerning the peaceful nuclear explosions (Art. V.) one can conclude that Art. IV. is far less concrete than Art. V.

Art. IV. is rather general, while Art. V. lays down the most important conditions of the share of non-nuclear-weapon States in the benefits of peaceful nuclear explosions. Thus under Art. V. the potential benefits of the peaceful nuclear explosions to non-nuclear weapon States i.) should be made available on non-discriminatory basis, ii.) the charge to such parties for the explosive devises used will be as low as possible, iii.) the charge should not include any charge for research and development. iv.) the negotiations on this subject shall start as soon as possible after the Treaty enters into force.

[34] Cf. Third Review Conference of the NPT. See in *United Nations Disarmament Yearbook*, 10 (1985) 179.

The above mentioned differences between Art. IV. and V. are due, among others, to the fact that at the time of the conclusion of the Treaty it was considered as a big sacrifice by the non-nuclear-weapon States to renounce of the benefits of the peaceful applications of nuclear explosion devices and to calm these States detailed provisions were included in the Treaty on the conditions of non-nuclear-weapons States' shares in the benefits of these explosion devices.

The 1995 Review and Extension Conference when interpreting Art. IV. of the NPT, added two very important conditions to the international cooperation in the peaceful uses of nuclear energy, saying that *preferential treatment* should be given to the non-nuclear weapon States party to the Treaty in all activities designed to promote the peaceful uses of nuclear energy and that the transparency in nuclear-related export controls should be prompted.[35]

Although the international cooperation in the peaceful uses of nuclear energy is prosperous, both on bilateral basis and under the auspices of the IAEA, there is wide divergence of views between the nuclear-weapon States on the one hand, and the non-nuclear-weapon States on the other, on a number of questions connected with international cooperation. On different occasions several non-nuclear-weapon States have challenged some developed States, particularly the nuclear Powers, not to fulfil their obligations under Art. IV. The nuclear-weapon States, to prevent nuclear proliferation due to nuclear exports and imports, tried to establish special arrangements for nuclear exports, which were again considered by a number of non-nuclear-weapon States as additional restrictions to their access to nuclear technologies.

III. Other proliferation risks

The NPT although containing detailed provisions on the prevention of the proliferation of nuclear weapons it treats only nuclear weapons and explosive devices and is silent on some other nuclear activities which could lead to the

[35] Decision 2 on the "Principles and objectives for nuclear non-proliferation and disarmament". Para. 16. and 17. See *United Nations Disarmament Yearbook*, 20 (1995) 27. The reference to preferential treatment of non-nuclear-weapon States was repeated in the document adopted at the Sixth Review Conference held in 2000.

production of nuclear weapons.[36] It should be mentioned that already not long after the conclusion of the Treaty several authors pointed out to these gaps.[37]

By our days it has become clear that uranium enrichment and production of plutonium entail tremendous risks to non-proliferation, since the related technologies are capable of obtaining fissionable materials necessary for the manufacture of nuclear weapons. Another short-coming of the NPT can be said to lie in the absence of provisions on the trade of nuclear materials and transfer of nuclear technologies and assuring that they will not result in support for military nuclear programs.

a) Unranium enrichment and production of plutonium

The problems relating to uranium enrichment and production of plutonium were addressed by several delegates at the Seventh NPT Review Conference, and Art. 4 of the Treaty was mentioned as one of the weakest provisions thereof. It was claimed that the "inalienable right" of non-nuclear-weapon States potentially allowed those States to put into operation, under the pretext of their peaceful nuclear programs, such facilities which are capable of manufacturing nuclear weapons.[38] With a view to averting the inherent proliferation risks, the Review Conference considered the proposals which advocated international cooperation in uranium enrichment and plutonium reprocessing as well as control over repositories for spent fuel and nuclear waste.[39] These initiatives, however, were conceived by several non-nuclear-weapon States to place further limitations on their rights of access to nuclear technologies.[40]

More than 25 years after the adoption of the Non-Proliferation Treaty the aforementioned short-coming of the instrument came into the focus of attention principally in connection with Iran's nuclear program, when several sources said, as will be discussed later, that under the guise of developing the country's peaceful nuclear industry a secret nuclear program was being implemented, with Iran attempting to produce plutonium and enriched uranium.

[36] On the shortcomings of the NPT see also the present writer's treatise: *The Utilization of Nuclear Energy and International Law*. Budapest, 1984. 94–97.

[37] Cf. Courteix, S.: *Exportations nucléaires et non-proliferation*. Paris, 1978. 4.

[38] Cf. Kile, S. N.: Nuclear arms control and non-proliferation. *SIPRI Yearbook 2006. op. cit.* 611.

[39] *Ibid.*

[40] *Ibid.* 611–612.

b) Nuclear exports

As early as the 1970s there were adopted certain restraints, both in internal laws and on the international plane, in order to ensure that trade in nuclear equipment, materials, etc. should not be allowed except in accordance with the NPT. This issue received still greater emphasis after the nuclear explosion by India in 1974, which led to the formation of the Nuclear Suppliers Group (hereafter NSG) with the aim of blocking the way to unauthorized nuclear activities by nuclear exports.[41]

The NSG's activity was of little, if any, relevance for quite a few years, but the NSG became increasingly active as from the 1990s, with its Warsaw session of 1992 resulting in an agreement of States on Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Material and Related Technology (the so-called Warsaw Guidelines).[42] No doubt that the Guidelines are not deemed to be a binding instrument of international law, but, considering that the substance thereof came to be incorporated in the internal laws of the NSG States, their application is obligatory. Under the Warsaw Guidelines specific rules of verification govern the nuclear materials and equipment that are capable of being used in both lawful and nuclear-weapon-related programs. The Annex to the document has listed the materials, equipment, etc.[43] that may only be exported to those non-nuclear-weapon States whose present and future nuclear activities as a whole come under IAEA safeguards. There can be but two exceptions to full safeguards control: on the one hand, an extraordinary circumstance, in which an item on the list is required for the safe operation of a facility subject to safeguards control and, on the other hand, a given transaction takes place on the basis of an agreement signed before 3 April 1992.

These provisions were tightened further after 11 September 2001, when the President of the United States called on the 40 member states of the NSG not to sell equipment and technology necessary for uranium enrichment and plutonium reprocessing to the States not possessing enriching or reprocessing facilities in operation. So, according to the American proposal, such installations, equipment and technologies may only be transferred to a state which was a party to the NPT on 1 December 2003 and operates an enriching and reprocessing facility which has not been closed definitively and is subject to

[41] No treaty was concluded for the establishment of the Group, at present 45 States are participating in the NSG's work. On the NSG see IAEA INFCIRC /539/ rev. 3.

[42] See IAEA INFCIRC /254/rev.1/ Part 2, July 1992.

[43] There are 67 kinds of equipment and material enumerated in the Annex. See IAEA INFICIRC/254/Rev.1/ Part 2, note 91.

IAEA safeguards control. All this means in effect that trade in enriching and reprocessing facilities is limited to the trade among the five nuclear-weapon States, to Japan, and, in the case of enriching facilities, to Argentina, Brazil, Germany and the Netherlands.[44]

The problems relating to the exportation of nuclear materials and equipment have given rise to some concern in respect of India during the most recent years.

As noted earlier, India is not a party to the Non-Proliferation Treaty, and in 1974 it conducted a nuclear explosion, insisting that it was engaged in peaceful nuclear activity. Nevertheless, that explosion turned India into a *de facto* nuclear-weapon State, altrough it is doubtless that, under the NPT, considered as nuclear-weapon States are only those that carried out a nuclear explosion prior to 1 January 1967. In this connection, however, the real problem concerns not the category to which India is nominally consigned, but the fact that, on the one hand, there is an admittedly nuclear-weapon State which is not a party to the NPT, with only a fraction of that State's nuclear activity being under IAEA safeguards control,[45] and, on the other hand, one wonder if, from the point of view of trade in nuclear materials and equipment, India is deemed to be a nuclear-weapon or a non-nuclear-weapon State.

It is in recent years that India's status under the NPT has come into particularly sharp focus since in 2005 the United States and India signed an agreement on the peaceful uses of nuclear energy.[46] As is pointed out by publicists, that agreement has brought a radical change in the non-proliferation policy of the United States, because India nuclear-weapon State not party to

[44] Cf. Michel, Q.: Critical Reflections on the Treaty on the Non-Proliferation of Nuclear Weapons. *Nuclear Law Bulletin*, 79 (2007) No. 2. 21.

[45] IAEA safeguards control as applied in respect of India is similar to that implemented in respect of nuclear-weapon States insofar as no more than certain nuclear facilities are under Agency safeguards on the basis of voluntary submission, whereas in the case of non-nuclear-weapon States party to the NPT the totality of a given State's nuclear activities is subject to verification.

[46] On 18 July 2005 President Bush and Prime Minister Manmohan Singh of India issued a joint statement entitled „Civil Nuclear Cooperation Initiative" containing, among others, a commitment by the US to "work to achieve full civil nuclear energy cooperation" and trade with India; while India pledged to separ its civilian and military nuclear facilities and programmes, to place under IAEA safeguards its civilian facilities, to continue its unuilateral moratorium on nuclear testing, etc. That document was followed by a further accord of the Ministers of Defence on cooperation between the two countries in the field of missile defence.

On the accord see Ahlström, C.: Legal Aspects of the Indian-US Civil Nuclear Cooperation Initiative. *SIPRI Yearbook 2006. op. cit.* 668–685.

the Non-Proliferation Treaty, and whose nuclear activity has not been under IAEA control up to now.[47] The agreement is therefore open to objection in two aspects, since the question arises, on the one hand, of how such an agreement can be reconciled with the non-proliferation obligations assumed by the United States in various treaties, particularly the NPT,[48] and, on the other hand, of whether the agreement is not in contradiction with the provisions of different international instruments on the trade of nuclear materials and equipment as well as of the internal law of the United States and India.[49] It appears that the Indian-American agreement also runs counter to the Warsaw Guidelines accepted by the United States, and that the agreement has for some time divided the NSG States, several of which objected to lifting the nuclear trade embargo which had been ordered against India 34 years before.[50] By September 2008, however, the NSG States had finally agreed on lifting the embargo, and the United States Congress approved the agreement with India at the end of September of the same year.[51]

In order to extend IAEA safeguards on Indian nuclear installations, since November 2007 the IAEA and India conducted negotiations on safeguards agreement, what was finally signed by the Parties in February 2009. In the future, under that agreement additional 14 India nuclear reactors are expected to be under IAEA safeguards.[52]

[47] See Michel: *op. cit.* 682–685.

[48] Along with these treaties, mention may be made of Security Council Resolution 1172 of 1998 calling upon the member States of the United Nations to block trade in any nuclear material or technology that would in any way promote Indian and Pakistani weapons programmes or ballistic missile programmes for nuclear delivery vehicles.

[49] On this score see Ahlström: *op. cit.* 682–685.

[50] At the Vienna Conference of the NSG States, held at the end of August 2008, France, Russia and the United States came out for lifting the embargo, while Austria, Ireland, the Netherlands, Norway, Switzerland and New-Zealand were strongly against doing so.

[51] At the time of closing the manuscript of this study, the agreement did not have the Senate's approval required for its entry into force.

[52] The agreement will enter into force on the date the IAEA receives from India written notification that its statutory and constitutional requirements for entry into force have been met.

Some of India's nuclear facilities (six in number) have for years been under IAEA safeguards by the terms of the agreement between the Agency and India, but this number affects only a fraction of India's nuclear activity.

IAEA control over additional facilities is not feasible unless India strictly separates its military and peaceful nuclear programmes. On this score see IAEA INFCIRC/731.

IV. A few words about the "problematic" States

1. The Iranian nuclear program

The problems with Iran's nuclear program emerged in 2002, when evidence showed that the Islamic Republic of Iran was constructing two undeclared nuclear fuel facilities south of Teheran.[53] The IAEA has since sought to shed light on Iran's uranium enrichment and heavy water programs first of all in the framework of safeguards agreements.[54] Teheran, however, has refused to cooperate with the Agency, and the Iranian nuclear program being and remaining intransparent for the IAEA.[55] The problem with Iran has for long years reside in the fact that, on the one hand, the question is left open whether or not they operate secret nuclear installations in the country and, on the other, whether activities prohibited by the NPT are not being carried out at the declared nuclear installations.

The international efforts for a solution of the problems relating to Iran's nuclear program have been exerted for years basically along two main lines. One line is that of the IAEA and the Security Council and bears upon Iran's obligations under the NPT and the safeguards system of the IAEA, and it was submitted to the Security Council and wich lead to imposing of sanctions on Iran. The other strand is that of diplomatic efforts, for which the take-off point was marked by the talks which three EU member states (France, Germany and the United Kingdom–the so-called EU-3) initiated with Iran in 2003,[56] with

[53] The start of Iran's nuclear programme goes back to 1959, when the US-supplied experimental reactor was put into operation. In the Shah's time it was planned to build 23 nuclear power plants up to 1990. The programme was stagnant for years because of the Iranian revolution of 1979 and the Iraqi-Iranian war, but from the mid-1980s a start was made on its continuation. An Iranian announcement of 2002 said that reactors of a combined capacity of 6,000 Mwe would be constructed during the following 20 years. For Iran's nuclear programme, see Kile, S. N.: Nuclear arms control and non-proliferation. *SIPRI Yearbook 2004. Armaments, Disarmament and International Security.* Oxford, 2004, 604–612.

[54] The safeguards agreement between Iran and the Agency is dated 13 December 1974. See IAEA INFCIRC/214.

[55] In 2003 Iran signed the Additional Protocol to the Safeguards Agreement on verification, but it has not ratified it to date.

[56] The legal basis of the talks was provided by the Paris Agreement of 15 November 2004. For the instrument, see IAEA INFCIRC/637.

In the Agreement Iran reaffirmed its intention not to acquire nuclear weapons in keeping with Art. II. of the Non-Proliferation Treaty, and it pledged itself to full and complete cooperation with the IAEA.

China, Russia and the United States joining in from 2006 and with the active participation of chief EU representative of common foreign and security policy.

As noted previously, the IAEA has for years been dealing with Iran's nuclear program, the Agency's General Conference and Board of Governors adopting numerous resolutions on the matter, Iran, however, failed to comply with the Board resolutions and continued its uranium enrichment-related and reprocessing activities.[57] This finally led to the Board deciding to report "Iran's nuclear dossier" before the Security Council on 4 February 2006.[58] Board Resolution 2006/27 emphasized that even more than three years of effort had stopped short of clarifying all aspects of Iran's nuclear program, the gaps in the Agency's information had continued to give cause for concern, and the Agency was not in a position to ascertain whether there were not being carried out any undeclared nuclear activities in Iran.

On 31 July of that same year the Security Council adopted its Resolution 1696 (2006) on Iran's nuclear program,[59] calling upon Iran to take the steps required by IAEA Board of Governors in its resolution GOV/2006/14 and to suspend all enrichment-related and reprocessing activities. The Resolution made it clear that if Iran failed to comply with that resolution, the Council will adopt appropriate measures under Art. 41. of the Charter. Since Iran had failed to give evidence of having suspended of its uranium enrichment activity and heavy water project, to implement the resolutions of the IAEA Board of Governors, the Security Council adopted several resolutions imposing sanctions against the Islamic Republic of Iran, these were Resolution 1737 (2006), 1747 (2007), 1803(2008).[60] The Council's Resolutions 1737 and 1747 are among

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For the talks between Iran and the EU-3, see Kile, S. N.: Nuclear arms control non-proliferation. *SIPRI Yearbook 2006. op. cit.* 619–623, 629–630.

[57] On 1 August 2005 Iran notified the IAEA of continuing its uranium enrichment programme.

[58] Cf. IAEA Board Resolutions GOV/2006/14. Sea also IAEA Board Resolutions GOV/2006/15, GOV/2006/27, GOV/2006/38.

[59] The resolution was carried by 14 votes in favour and 1 vote (Qatar) against.

[60] These sanctions have banned Iran's arms export, freezed the assets of private persons, entities engaged in the country's proliferation-sensitive nuclear activities as well as on the development of nuclear delivery systems. The Security Council resolutions even called upon States to restrain the entry into or transit through their territories of individual who are engaged in directly or providing support for Iran's proliferation sensitive nuclear activities or for the development of nuclear weapon delivery systems. The names of key persones, entities, etc. concerned were enumerated in the Annexes.
In its resolution 1835(2008) of 27 September 2008 the Security Council reaffirmed the provisions of its previous resolutions on Iranian nuclear issue and called upon "Iran to

its rare cases deciding on sanctions by unanimous votes, a fact indicative in the first place of the gravity of the situation and of the proliferation risks inherent in Iran's secret nuclear program.[61]

As mentioned earlier, the diplomatic talks seeking a solution to the Iranian nuclear problems have been under way, with longer or shorter interruptions, since 2003. Participating in them are Iran on the one hand and, on the other, six States (China, France, Germany, Russia, the United Kingdom, and the United States) as well as the chief EU representative of common foreign and security policy. The foremost aim of the discussions is to have Iran give up its uranium enrichment program in its entirety. In June 2006 the "Six" presented to Iran a proposal for a long-term comprehensive agreement, with a view to seeking a comphensive, long-term and proper solution on the problem and to develop cooperation with Iran, based on mutual respect and the stablishment of international confidence in the exclusively peaceful nature of Iran's nuclear program.[62] In its response to the proposal Iran said it was not engaged in any prohibited activity and that otherwise, in developing its peaceful nuclear industry, it was making use of its right to the peaceful uses of nuclear energy as recognized by Art. 4 of the NPT.[63] Some progress toward a settlement of the situation is indicated by the events in the summer of 2008; among them emphasis is deserved, on the one hand, by Iran's Note of 16 June to IAEA, in which the Teheran Government expressed its readiness to conduct constructive negotiations within six months,[64] and, on the other hand, by the Note of 25 June 2008, which, formulated by the "Six" with the support of the chief EU representative of common foreign and security policy, contains very detailed proposals for various facets of cooperation with Iran in the fields of politics, economy and regional security, but makes related negotiations conditional on

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comply fully and without delay with its obligations under the previous resolutions of the Security Council, and to meet the requirements of the IAEA Board of Governors."

[61] It should be mentioned that this kind of sanctions imposing Security Council's resolutions and the Security Council's anti-terror resolutions were strongly criticised by several authors.

[62] For the proposal, see UN A/61/514-S, 2006/806.

[63] For Iran's response to the proposal, see IAEA INFCIRC/685.

According to some views, Iran's persistence in its nuclear programme is made suspicious by the fact that Iran is one of the world's richest countries in oil resources and that it can in no way be said to face with energy problems. Nonetheless, Iran has repeatedly stated the same, namely that nuclear energy serves to meet national energy needs, while it wishes to use its revenues from oil and gas for increasing its foreign exchange reserves.

[64] For the Iranian Note, see IAEA INFCIRC/729.

Iran's ceasing its uranium enrichment and plutonium reprocessing activities in compliance with Security Council Resolution 1803.[65]

However, according to the last report submitted by the Director General to the IAEA Board of Governors in February 2009, since Iran does not implement the transparency measures required by the Security Council, the Agency is still not in a position to provide credible assurance about the absence of undeclared nuclear material and activities in Iran.[66]

2. DPRK's nuclear issue

The concern about the nuclear program of the DPRK emerged after the country had acceded to the Non-Proliferation Treaty in 1985 and the full-scope safeguards agreement with IAEA as required by the NPT had entered into force in 1992.[67]

From the very beginning there had been contradictions between the data reported by DPRK to the IAEA under the safeguards agreement and the results of the Agency's analysis, and, according to the IAEA, there existed in the DPRK undeclared plutonium. With a view to clarifying the situation, the Agency requested access to additional information and initiated on-site inspections, but the DPRK rejected them and, moreover, informed the world public in March 1993 of its withdrawal from the Non-Proliferation Treaty.[68] However, as a result of the negotiations between the DPRK and the United States, the DPRK announced, one day before the expiry of the 30 days' notice of with-

[65] For the proposal, see IAEA INFCIRC/730.

[66] Cf. IAEA GOV/2009/8.

[67] The first experimental nuclear reactor of North Korea was built in Yongbyon with Soviet assistance and started operation in the 1960s. From the end of the 1970s North Korea has sought to have its nuclear programme gradually achieve a „status of its own", without the need to rely on foreign assistance.

For the safeguards agreement, see IAEA INFCIRC/403.

[68] North Korea said that its withdrawal from the NPT had been motivated by, inter alia, the US military manoeuvres threatening the country with nuclear war. After the notification of withdrawal the three depositaries of the Treaty–the Russian Federation, the United Kingdom and the United States–published a joint declaration questioning the real cause for withdrawal as stated by North Korea to be „exceptional circumstances relating to the substance of the Treaty" under Art. X. Para. 1, thereof and „jeopardizing the higher interests" of the country. At the time the withdrawal by North Korea was also dealt with by the Security Council, which in Resolution 825 (1993) called upon that country to reconsider its decision.

drawal, the suspension of its withdrawal from the NPT for as long "as it considers necessary."[69]

Since that country continued raising obstacles to IAEA inspections in violations of the safeguards agreement, the case of the DPRK was considered both by the IAEA Board of Governors and, on the basis of its report, by the Security Council. The situation was further complicated by the DPRK's withdrawal on 13 June 1994 from the International Atomic Energy Agency, of which it had been a member for 20 years. There is no doubt that this step entailed an interruption of relations between the Agency and the DPRK in a certain aspect, but at the same time the country's withdrawal from the Agency did not affect its contractual bligations under the NPT and the safeguards agreement concluded as required by that Treaty.

In the autumn of 1994 the North Korean nuclear crisis seemed to be lessened somewhat insofar as the United States and the DPRK signed a framework agreement (the so-called Agreed Framework)[70] at Geneva on 21 October 1994, to the effect that the United States would build two light water reactors in the DPRK[71] in return for the latter country halting the construction of its nuclear research centre in Yongbyon and giving up its nuclear weapon program.[72]

This notwithstanding, the following years witnessed the continuation of verification-related disputes between the DPRK and IAEA. The greatest problem concerning the DPRK's nuclear program lay in that the Agency actually never having had an opportunity to receive an overall picture of the DPRK's nuclear activity and to satisfy itself in a manner admitting of no doubt that the country's nuclear industry was serving peaceful purposes, and in that, as mentioned already, the IAEA had been of the position since 1993 that the DPRK was not

[69] Thereafter North Korea agreed to limited safeguards control, but these steps fell short of clarifying the question whether North Korea was really using its declared nuclear facilities for peaceful purposes.

[70] For the Agreed Framework, see http://www.Kedo.org/pdfs/AgreedFramework

[71] Also, the Agreement provided for the normalization of economic and political relations between the two States, the promotion of cooperation in the field of peace and security on the Korean Peninsula, and stated, inter alia, that North Korea would remain a party to the Non-Proliferation Treaty.

[72] With the aim of implementing the agreement of 1994, the United States and North Korea set up in 1995 the Korean Peninsula Energy Development Organization (KEDO), to which adhered later Australia and New-Zealand; Argentina, Chile and Indonesia in 1996; the European Union and Poland in 1997; the Czech Republic in 1999; and by Uzbekistan in 2000. Owing to North Korea's continuous breach of its obligations under the agreements, the Executive Board of KEDO decided to discontinue the light water project on 31 May 2006.

acting in compliance with the provisions of the safeguards agreement. The Agency's suspicion was heightened by the implementation of secret uranium enrichment programs in the DPRK, the inobservance of the American-North Korean framework agreement of 1994, and the expulsion of IAEA inspectors from the country.

In 2002 North Korea came to openly concede its implementation of a uranium enrichment program for nuclear weapon purposes. That admission not only offended the Non-Proliferation Treaty and the safeguards agreement, but also ran counter to other international documents, such as, inter alia, the joint declaration of North and South Korea concerning the denuclearization of the Korean Peninsula.[73]

Afterwards North Korea was unwilling to cooperate with the IAEA in any way, to comply with the provisions of the safeguard agreement, and announced instead, that it would withdraw from the NPT with effect from 11 January 2003.

In an endeavour to resolve the security problems associated with North Korea's nuclear weapon program there were started negotiations in August 2003 with the participation of the United States, Russia, the Republic of China and Japan, along with the representations of the two Koreas.[74] The negotiations were conducted in several rounds, with dangers of an ultimate break thereof, when in February 2005, for instance, North Korea announced that it was in possession of a nuclear weapon and concurrently suspended its participation in the six-party negotiations for an indefinite period. The discussions nevertheless ended up yielding results in that the parties adopted a Joint Declaration, in which North Korea, afflicted as it was by immense poverty and famine, undertook in principle, in exchange for food aid and energy sources, to end its nuclear program, return to the NPT, and apply the IAEA safeguards system. Yet, for all that, on 9 October 2006 it informed the world public that it had carried out an experimental nuclear explosion, which consequently led to the interruption of the negotiations.[75]

[73] In December 1991 North and South Korea signed a declaration on denuclearization, committing themselves not to possess either nuclear weapons or plutonium reprocessing and uranium enrichment facilities, and to conduct negotiations on a mutual verification system. Still, as early as 1992, the IAEA found evidence that North Korea was secretly engaged in plutonium reprocessing.

[74] The nuclear program of North Korea was looked at *ab initio* with particular concern by the neighbouring States of Asia, fearing that North Korea's nuclear policy would generate a nuclear arms race in the region. Cf. Lee, K. B.: North Korean nuclear development, missiles and energy crisis. Cf. *Friend of North Korean People*, 18 (2004) 55.

[75] In the wake of the North Korean nuclear explosion the Security Council, in its Resolution 1718 of 14 October 2006 adopted by a unanimous vote, ordered the application

However, owing to Beijing's pressure on North Korea, the negotiations were resumed in February 2007. On 13 February of that year an agreement was reached in Beijing to the effect that, in return for economic, energetic and humanitarian assistance, North Korea undertook to end its nuclear program for military purposes and to ensure that the shutting down and disablement of its nuclear centre in Yongbyon would take place under IAEA control. First it appeared that North Korea had observed the provisions of the aforementioned agreement for a few months only, and on 24 September 2008 it requested the IAEA to remove the Agency's seal from the Yongbyon centre, while announcing that reprocessing would go on at the installation and that from that point of time the Agency's inspectors would have no access thereto. But, according to the letest information, in the DPRK the IAEA has continued to monitor and verfy the shutdown status of the Yongbyon nuclear facilities and the fuel rods discharges from the facility are under Agency surveillance.[76]

Conclusions

The NPT is one of the most important treaties which, concluded in the middle of the 20th century, have considerably enhanced the cause of nuclear disarmament during the past period of more than four decades. When emphasizing the significance of the Treaty one cannot be silent about certain weaknesses of its regime, of which reference is made by many to the discriminative character of the NPT.

By its structure and provisions the Non-Proliferation Treaty has divided the States into two groups, distinguishing those possessing and those not possessing nuclear weapons at the time the Treaty was concluded. In effect, the rights and obligations of the States party to the NPT are tailored to the group to which they belong, and the gravest violation of the NPT is that when States seek to change their status as defined in the NPT, notably by trying to gain control of nuclear weapons or other nuclear explosive devices.

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of sanctions under Chapter VII of the Charter, calling on Pyongyang not to carry out any further nuclear tests nor to launch ballistic missiles, to return forthwith to the NPT, and to accept safeguards control by the IAEA.

[76] Cf. IAEA Director General's introductory statement to the Board of Governors on 2 March 2009. However, some weeks later, on 15 April 2009 the DPRK has announced of ceasing all cooperation with the IAEA and asked the Agency's inspectors to leave the county at the earliest possible time.

Under the NPT, research in and production and application of nuclear energy for peaceful purposes are "inalienable rights", but their exercise should be in keeping with the basic obligation of non-nuclear-weapon States under the Treaty not to acquire in any form nuclear weapons or other nuclear explosive devices and not to carry out unauthorized nuclear activities under the guise of their peaceful nuclear programs.

The 40th anniversary of the conclusion of the Non-Proliferation Treaty, the four decades that have passed since the Treaty's entry into force, and the next Review Conference will afford a good opportunity[77] to strengthen the non-proliferation regime, perhaps in form of a protocol annexed to the NPT. Adoption of such a document is necessitated by the fact that there are new dangers of nuclear weapon proliferation coming into view in our days.

If the States of the international community are in real earnest about the cause of preventing the proliferation of nuclear weapons, they should make every effort to assist the non-nuclear-weapon States in the implementation of their peaceful nuclear programmes, for it is abundantly clear that international cooperation, surrounded with reliable guarantees, in the peaceful uses of nuclear energy is of paramount importance to non-proliferation.

[77] The negotiations concerning the preparation of the next Review Conference, due to be held in 2010, have been under way since 2007.

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DÁNIEL DEÁK *

Confrontation RE: Legal autopoiesis theory in operation– a study of the ECJ case of C-446/03 *Marks & Spencer v. David Halsey*

Abstract. This paper has been prepared in the hope of giving new insights into the case of C-446/03 Marks & Spencer. The author tries to explore the process of communication in the light of the legal autopoiesis theory, the final result of which is the judgment. Reading it, one can find plain arguments both for the effective protection of EC freedoms, including the freedom of establishment, one the one hand, and for stopping regulatory and tax competition, and safeguarding the national interests of Member States, on the other one. The methodology of legal autopoiesis may be useful in better understanding of the message the judgment has negotiated.

Keywords: normative closure and cognitive openness; non-restriction of fundamental freedoms; effective enforcement of rights; equivalence; fiscal cohesion; grant of a last resort; reconciliation of conflicting ideas; micro perspective of harmonisation; temporality in law; filtration of the diverse interpretations of law

The concept of confrontation

This paper has been prepared in the hope of giving new insights into the above-mentioned case. The respective ECJ judgment can be interpreted, based on its wording.[1] It seems to be more important, however, to try to explore the process

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[1] The case of 446/03 Marks & Spencer v. David Halsey concerns the ability of a profitable UK parent company to offset losses generated by its overseas subsidiaries under the UK group relief rules. The case was referred to the ECJ. The ECJ made its judgment on 13 December 2005, referring the case back to the High Court for resolution. The ruling of the High Court was challenged before the Court of Appeals. The Court of Appeals entered its judgment on 20 February 2007. The House of Lords Appeals Committee refused to grant an appeal against the Court of Appeals judgment.

of communication as well, the final result of which is the judgment. Community and tax law commentators have cited this case more widely than any other direct tax case before. Perhaps not surprisingly, the judgment is not unambiguous. One can find plain arguments both for the effective protection of EC freedoms, including the freedom of establishment, one the one hand, and for stopping regulatory and tax competition, and safeguarding the national interests of Member States, on the other one. The methodology of legal autopoiesis may be useful in better understanding of the message the judgment has negotiated.

I. Major theses of the legal autopoiesis theory

An analytic viewpoint that highlights stability in social practice with regard to the interaction between a system and its environment is an integral part of the sociology as elaborated already by Talcott Parsons: „one very highly generalized way of conceptualizing a minimal aspect of a system might be to consider it an area of relative non-randomness."; „Not only must system boundaries, by some mechanism(s), be maintained in relative integrity, but by some mechanism(s) the system must both draw 'sustenance' from the environment and 'defend itself' against extreme environmental fluctuation. At the boundary of the system–permeable, open to environmental impingement and intrusion–there must be filtration mechanism, accepting and rejecting possible environmental inputs, and regulatory mechanisms minimizing environmental fluctuation either by direct action into the environment toward control of its relevant aspects or, at least, by neutralizing those effects of such fluctuation as cannot effectively be controlled."[2]

From the viewpoint of the sociology of functionalism (Malinowski) and neo-functionalism (Merton, Parsons, Luhmann), it can be highlighted in social practice what is congruent while the macro conditions of social structure are unaffected. From the perspective of functionalism, what has remained in our view on social practice is residual, instead of taking into account the big categories of the production and reproduction schemes of social relationships (social classes, capital entitlement and poverty, the conflict between North and South, etc.). Thus, one can take a look at the various patterns of social integration (like redistribution or reciprocity) or at the process of the internal reconstruction

[2] Ackermann, Ch.–Parsons, T.: The concept of 'social system' as a theoretical device. In: McQuarie, D. (ed.): *Readings in contemporary sociological theory: from modernity to post-modernity*. Englewood Cliffs, 1995. 24 [from: Direnzo, G. J. (eds.): Concepts, theory and explanation in the behavioural sciences. New York, 1966].

of argumentative discourse where the inter-subjective use of a common language will be developed. Functional differentiation (into the spheres of economy, law, sciences, religion, etc.) is a basic development of the Western-type modern history.

From the viewpoint of late functionalist sociology, social life cannot merely be described by the traditional categories of class conflicts, the ownership of the means of production or the nation state. As a product of modernisation, in the Western societies it has been more relevant to focus on the events of communication. This way, the monological view of society can be overcome by relying on communicative rationality, as identified by Jürgen Habermas.

With the onset of modernisation, individuals have been liberated from pre-economic control. A social community is able to organise itself as civil society, independent of its nation state. In addition to the autonomous forms of social activities, autopoietic (self-referential) systems can emerge as well. As explained by Niklas Luhman, in a theory of such self-referential systems, the traditional link of the idea of self-reference to consciousness as the basis of operation is abandoned. Thus, the theory of "subject-ness" of consciousness (subiectum or hypokeimenon) and the primacy of the epistemological difference between object and subject are rejected. Instead, two kinds of operations are distinguished, i.e., self-reproduction and observation.[3] An empirically ascertainable connection exists between the principle of differentiation of social systems and the form, in which subsystems differentiate themselves in society, being self-referentially closed, and open to their environment.[4] In late functionalist sociology, what is causal will be replaced by what is structural.

Given the phenomenon of the autopoietic development of society, a certain break with Kantian methodology can be explained by Luhmann as follows: the voluminous empirical research on causal attribution teaches us that in the matter of causality there is no way of avoiding selective judgments, and this shifts the question of the essential causes into the question of the structural conditions of the causal plan used. Autopoietic systems need not be transparent to themselves; they find nothing in themselves that could be regarded as an undeniable fact of consciousness and applied as an epistemological a priori principle; the assumption of an a priori is replaced by recursivity itself.[5]

[3] Luhmann, N.: The unity of the legal system. In: Teubner, G.: (ed.): *Autopoietic law: A new approach to law and society*. Berlin, New York, 1988. 13.

[4] *Ibid.* 31.

[5] Luhmann, N.: Closure and openness: On reality in the world of law. In: Teubner (ed.): *Autopoietic law... op. cit.* 336.

Whereas classical scientific thought holds a paradigm to be a "linkage through inputs" (the outside determines the changes in the system), the paradigm of "linkage through closure" can be proposed as an alternative: it is the internal coherence of the system that determines its development. Then autopoietic systems define themselves against the background of an environment.[6] The differentiation of a legal system is based on the distinction between normative and cognitive expectations. Legal systems are to combine the closure of recursive self-reproduction and the openness of their relation to the environment (closure in normativity and openness in their cognitive respect).[7]

The conceptualization of social systems brings about three important changes in social theory:[8]

– a radical temporalisation of social systems, meaning that the elements of social life are not stable, but are "events";

– what has to be maintained in a society is the recursively closed organisation of an open system (closure in operation); and

– observation itself is an operation of an autopoietic system (openness in cognition).

According to the theory of Niklas Luhmann (on the unity of the legal system)[9]

– legal acts are those communicative events that change legal structures;

– the legal system is defined by the circular relationship between legal acts and legal norms; and

– the interplay of closure and openness is represented in the legal system by the combination of normative closure and cognitive openness.

Jean-Pierre Dupuy supplies three different interpretations of how the legal system can be open and closed at the same time:[10]

– closure and openness refer to different domains of the legal system (normatively closed, cognitively open);

– legal closure implies legal openness (order from noise[11]); and

[6] Ost, F.: Between order and disorder: The game of law. In: Teubner (ed.): *Autopoietic law*... 73.

[7] Luhmann: The unity of the legal system. In: Teubner (ed.): *Autopoietic law*... *op. cit.* 19–20.

[8] Teubner, G.: Introduction to autopoietic law. In: Teubner (ed.): *Autopoietic law*... *op. cit.* 3. For concept summaries of the autopoiesis and legal autopoiesis theories, see separate annexes below.

[9] *Ibid.* 4.

[10] *Ibid.* 5.

[11] Atlan, H.: *Le crystal et le fume.* Paris, 1979. 5, 41, 56.

– self-transcendence of a normative order can be explored (see Robert Nozick's theory of entitlements with its self-referential character of procedural justice or Friedrich Hayek's theory of law as a spontaneous social order).

Law that negotiates reflexive communication provides procedures without intervening in the internal matters of the subjects-at-law. In the beginning of the 20th century, Georg Jellinek identifies the term of legal reflex with the indirect effect of law in the absence of explicit statutory law provisions.[12] According to Gunther Teubner, reflexive law is characterised by a new kind of legal self-restraint. Instead of taking over regulatory responsibility for the outcome of social processes, reflexive law restricts itself to the installation, correction, and re-definition of self-regulatory democratic mechanisms.[13]

According to Teubner, autopoiesis does not exclude evolution, but implies a redefinition of evolution. The questions that can be raised in this respect are:[14]

– How does the legal system evolve into autopoietic closure?

– How does legal evolution operate after an autopoietic closure of the legal system?

The proposed solutions are as follows:

– The first question can be answered with reference to the construction of a hyper-cycle (pre-autopoietic evolution–socially diffuse law develops higher forms of autonomy via the cyclical constitution of its system components).

– The second question can be answered with reference to internalisation (post-autopoietic evolution–legal development is coupled to broader social developments by specific mechanisms of co-evolution).

Upon applying the legal autopoiesis theory to real life, it is crucial to explain changes in the environment (structural couplings). Luhmann explains (in his theory on closure and openness) that the theory of self-referential systems leads inevitably to the following dilemma: on the one hand, no system is in a position to operate outside its boundaries, on the other, structural evolution requires the assumption that a system's environment produces effective constraints on the system. Luhmann's proposal for the solution consists in a distinction[15]

[12] Jellinek, G.: *Allgemeine Staatslehre.* Berlin, 1914. 69–70.

[13] Teubner, G.: Substantive and reflexive elements in modern law. *Law and Society,* 17 (1983) 239.

[14] Teubner: Introduction to autopoietic law. In: Teubner (ed.): *Autopoietic law... op. cit.* 8.

[15] *Ibid.* 10.

between internal information processing and external constraints.[16] As to the realisation of external constraints, the following can be highlighted:

– the materiality continuum as the material-energetic basis of meaning systems; and

– the simultaneous presence of events in several meaning processing systems.

II. Application of the legal autopoiesis theory to the case of C-446/03 Marks & Spencer

1. Temporalisation of law: flexibility in the application of the very same statutory schemes

Legal rules are being replaced by legal acts which are simply communicative events (enouncements) appearing in the legal order. Teubner asserts[17] that legal rules lose the strategic position they once had as core elements of law. In a switch from structure to process, the central elements of a legal order are "énoncés", communicative events, being legal acts, and not legal rules. It has proved to be hopeless to search for a criterion delineating social norms from legal ones. The decisive transformation cannot be found in the inherent characteristics of rules, but in their insertion in the context of different discourses.

From the perspective of the legal autopoiesis theory, the case of C-446/03 Marks & Spencer can be seen as a product of the temporalisation of legal institutions. It is embarrassing to admit, how difficult it is to interpret this case. The story can be told in different ways, depending on the standpoint the story-teller has held. Surely, one can realise the legal acts as communicative events that may change legal structures. Key to understanding this case is to appreciate the degree of flexibility of the national tax administration in applying statutory schemes. In the specific case, the UK loss relief regime is put in the context of the question as to whether the UK parent company should be granted a last resort. The question is answered (in the affirmative) as a result of a series of discussions. At the end of the process of communication, an answer is given, which cannot yet be repeated in the same way in another case.

[16] As an antecedent, see Ashby's theory on a cybernetic system that can be defined as one "open to energy but closed to information and control"; Ross Ashby, W.: *An introduction in cybernetics*. London, 1956. 4.

[17] Teubner, G.: Global Bukowina: Legal pluralism in the world society. Teubner (ed.): *Global law without a state*. Aldershot, 1997.

The facts that are relevant to the particular legal case do not really provide solution (for a summary of facts, see the separate annex below). It would be misleading just to focus on the mere facts as covered by statutory law schemes. For example, a particular meaning could be given to the legal fact that the UK consortium system is different from the Scandinavian loss contribution system. It is still more interesting to look behind the pure facts. The UK consortium system is not deemed to be inconsistent with Community law. The competent UK tax authority is, however, expected to apply national law in a manner, which is friendly enough for the purposes of the effective enforcement of taxpayer rights in association with the EC freedom of establishment. The legal acts of the tax authority may lead to real changes in the legal structure. While the UK tax law on consortia does not require generosity, the application of it to a particular case does require taking into account how effectively taxpayer rights can be exercised. The legal acts of the tax authority may thus imply the possibility of a last resort to the effective protection of taxpayer rights, not arising purely from the legal facts.

It is important to distinguish between the internal conception and organisation of a national tax system and the possible effect of its operation on the exercise of EC freedoms. The Community legislator, like the Council or the Commission, or judiciary bodies like the ECJ, must not interfere with the internal organisation of a national tax system. They can halt, however, their operation where the application of national tax law results in the unjustifiable restriction of EC freedoms. The application of particular national tax rules constitutes communicative events–and resources of the self-generation of Community law–at the time when they commence interaction with the exercise of fundamental freedoms.

2. *Closure in operation and openness in cognition, order from noise and self-transcendence*

No sub-systems can be reasonably supposed unless they are close in their operation and open in their capacity of observation at the same time. Structural coupling and openness to its actual environment cannot thus be interpreted without the presupposition of normative closure. A subsystem will not be closed due to its simple separation from its environment. It will be closed in the process of communication with its actual environment only, at the end of which both the system and its environment will be changed.

Closure in operation and openness in observation do not only mean that they refer to the different domains of a legal system. It also means that, paradoxically, legal closure implies legal openness. In other words, law–as reflexive law–fills in an autopoietic system the role of installation, correction and redefinition of

self-regulatory mechanisms. It provides filtering of non-legal events through the lens of law. As already Kelsen explains, "the law is like King Midas. Whatever he touched was immediately changed into gold; likewise, everything the law has to do with becomes law".[18] Due to a series of communicative events, a type of order can be developed without antecedents. Namely, these developments cannot be interpreted based on the simple causality or the study of the relationship between what is objective and subjective. This way, order can be evolved from "noise", a normative order can emerge that is able to justify itself by way of self-transcendence.

Despite the common assumption of a common static view of law, the actual meaning of legal norms may be instable. This is because different elements of the sets of legal norms may be called forth, depending on the circumstances. Coping with the vulnerability of such norms requires a kind of relational way of thinking. A correspondence theory is operational, provided that the facts relevant to legal decisions do not change in an abrupt, comprehensive manner. In the instance where there is no longer stability in the relevant meaning of legal institutions, harmony cannot be achieved between the legal norms and the ever-changing outward reality. Harmony can, however, be reached in another respect, suggested precisely by a coherence theory. Legal institutions may produce harmony in discrete micro relations where the applicable norms are coherent and the people involved in them have developed their sense of communication, adequate to the particular case.

A legal system can eventually be expected to have provisions that are in conformity to each other. This is a holistic idea of law, based on the assumption of system-oriented conformity. That is, legal sources need to be interpretable in a close-circuit system, which is legitimised in itself. Recursive reasoning is not given from the outset: it appears at the end of a process of communication. A good judgment may benefit from the communication completed in the court room. Submissions, statements and declarations of judges and litigating parties are made in interaction with each other. At the end of this process, a ruling should emerge which contributes to the strengthening of the consistency and integrity of law. A good judgment is an example of the coherence to be achieved during the litigation process.

[18] Ost: Between order and disorder... In: Teubner (ed.): *Autopoietic law... op. cit.* 79; Kelsen, H.: *Pure theory of law.* Berkeley, 1967. 369.

(i) Simultaneous application of the principles of fiscal cohesion and the effective enforcement of rights

The case of C-446/03 Marks & Spencer cannot be solved without understanding a micro system of the effective enforcement of taxpayer rights in the light of Community law, which is normatively closed and cognitively open. In general, Community law has been developed without relying on the legitimising force of a nation state. Instead, it has been evolved over the decades due to the practice of the citizens to apply it as a system of law, which is autonomous, takes priority over national law, implies a number of provisions with direct effect, and provides for the effective protection of individual rights. The Community law product of "acquis communautaire" and the judiciary practice developed by the ECJ have never been posited by single nation states. They have been evolved due to the functional differentiation of Community law itself. Community law is still open to the changes taking place in its social environment. For instance, in the recent three or four years, more emphasis has been placed on the application of the EC Treaty to specific cases than on interpreting the EC Treaty in a rather innovative way, with the result of developing judiciary law.

The judgment in C-446/03 Marks & Spencer can rely on the Community case law developed on the assessment of the restrictions of national legislation on the freedom of establishment, and on the possible justification of these restrictions. The process of applying the non-restriction principle to direct tax cases started with C-264/96 ICI and has been open to date. Furthermore, it has been uttered, among other things, in the case of C-446/03 Marks & Spencer that:

– the territoriality principle of taxation, as recognised in the C-250/95 Futura Participations case, needs to be respected;

– the fiscal cohesion principle as introduced in the C-204/90 Bachmann case must not be interpreted too narrowly, that is to say, only in relation to the same taxpayer and the same item of tax liability; and

– the competent tax authority must not disregard if there is any instance for the taxpayer in the UK to recognise for tax purposes (and carry over) the losses sustained in another Member State; as a last resort, the relief of the cross-border loss transfer must be granted.

The Community law, being applicable to the case of C-446/03 Marks & Spencer, and consisting of the above components, can be considered as a normatively closed system. It can be interpreted as a result of the combined application of the principles to the single case, which otherwise are in contradiction with each other. The Community law, serving as a basis for the decision in the C-446/03 Marks & Spencer, has been developed progressively during a process of about half of a decade as a result of the assessment of the restrictions

on the freedom of establishment by national tax legislation and the evaluation of their possible justification.

The Community law, applicable to this case, can still be regarded as a cognitively open system. Notably, the fiscal cohesion principle has been altered significantly since its formulation in the C-204/90 Bachmann case. The EC Court of Justice has been careful in applying this principle since the time the C-204/90 Bachmann case was decided, giving all the less opportunity for its application. More importantly, the non-restriction principle has been extended to direct tax cases even by providing for the granting of tax relief as a last resort. This constitutes evidence for the right of citizens to exercise the freedom of establishment even in direct tax cases. The UK can be implicated in the case of C-446/03 Marks & Spencer. This is because it has infringed both the effectiveness principle (Article 10 EC) and the proportionality principle (third Paragraph of Article 5 EC) to the extent that the taxpayer would unreasonably suffer from the non-recognition of tax losses and, in particular, from the fact that the restriction on the cross-border loss-transfer would go beyond what is necessary in order to protect the national tax base.

(ii) Emergence of the principle of equivalence, applicable to direct tax cases

The judgment in C-446/03 Marks & Spencer has created a new language. As a result, a new view has formed on the old items of EC harmonisation, the non-restriction of fundamental freedoms and the effective protection of taxpayer rights. The principles of fiscal cohesion, non-restriction and effectiveness cannot be regarded in the same way, as it was the case before. Through the decision in C-446/03 Marks & Spencer, a new type of balance between the territoriality principle of taxation and the non-restriction principle has been achieved so far.

It is a major development that, for the first time, the equivalence principle as enshrined in Article 100b of the Maastricht Treaty has been applied to a direct tax case. This means first that national tax systems can be developed due to the recognition of the sovereignty of Member States in the formulation of their system of taxation and economic policy. A Member State is expected secondly, however, to take into account that its own legal institutions need to be compatible with its counterparts, i.e., the law adopted in another Member State. Once the discrepancy between national legislations constitutes an obstacle to the exercise of fundamental freedoms, it must be eliminated. The non-recognition of the losses with the Luxembourg subsidiary of Marks & Spencer UK in the UK represents such a discrepancy, although the UK is not requested to change its statutory law.

Article 95 EC on internal market legislation requires the advanced forms of harmonisation compared to the common market legislation, even though not in the area of taxation. The Article 95-based power of Community legislation may be in contradiction with the subsidiarity principle (second Paragraph of Article 5 EC). However, the principle of subsidiarity does not call into question the powers conferred on the Community by the EC Treaty. It is still true that Article 95 does not give the Community exclusive power to legislate. It gives a certain competence only for the purposes of improving the conditions for the functioning of the internal (single European) market by eliminating barriers from fundamental freedoms and removing distortions of competition.[19]

Entitlement for the transfer of a Member State's regulatory power to the Community level comes from the specific conferment of the power principle (first Paragraph of Article 5 EC). It is reflected in the joined cases of C-154/04 Alliance for Natural Health, Nutrilink and C-155/04 National Association of Health Stores where the EC Court of Justice has confirmed its practice that the disparities between Member States do not require harmonisation, taken by itself. Harmonisation is necessary only where disparities in national legislation disturb the smooth operation of the internal market, and it is therefore necessary to remove those disparities.[20] By virtue of the EC Court's case-law, a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC (Para. 28 of the quoted judgment). The Court explains (in Para. 78 of the joined cases of C-154/04 and C-155/04): the procedure of the so-called comitology[21] is intended to reconcile, on the one hand, the requirement for effectiveness and flexibility, arising from the need regularly to amend and update aspects of Community legislation in the light of developments in scientific understanding in various areas and, on the other hand, the need to take account of the respective powers of Community institutions.

The need of coordination between Member States does not prejudice the basic principle that Member States enjoy freedom in deciding matters that do not require a higher level of decision. The national competence of regulation of one Member State cannot be exercised, however, without taking into account what is happening in another Member State. For example, where a lady insured in France, staying in Germany is in a need of hospital treatment in Berlin, the French national authority of social security cannot refuse giving its permission for this treatment outside France and reimbursing her for the costs of treatment

[19] C-491/01 BAT, ECR 2002. I-11453, Paras 178–179.

[20] European Court Review, 2005. I-06451, Para. 28.

[21] Report from the Commission on the working of the Committees during 2001, COM (2002) 733 final.

where it has turned out that on her stay away from France it was not possible to provide her with treatment in France without delay that would be equivalent to treatment provided in Berlin.[22]

A Member State is not obliged to co-operate with another Member State unless the denial of coordination with the other Member State would prevent citizens from exercising their fundamental rights across the Community. The EC Court made use of this principle in the Marks & Spencer case as well: for the lack of a fiscal nexus established in the UK, the United Kingdom is not obliged to grant the opportunity of carrying over the losses of a Luxembourg subsidiary to a UK parent company unless the UK taxpayer proves that in Luxembourg there is no way of recognising for tax purposes any loss carry over. This is something new in the Advocate General's opinion that he would extend the equivalence principle as enshrined in Article 100b of the Maastricht Treaty to the matters of direct taxation, that is, to a territory where Member States traditionally enjoy freedom.[23]

(iii) Striking a balance between instances of fighting against trafficking in losses and granting a last resort to cross-border loss carry over

The starting point for the ECJ in C-446/03 Marks & Spencer is its concern that the arbitrage in jurisdictions and trafficking in cross-border losses needs to be stopped. Clearly, the ECJ is anticipated to combat tax avoidance or the abuse of Community law. This is one aspect of the complexity only the EC Court has to encounter, however. The other one is equally important. That is, the taxpayer's right to exercise the EC freedom of establishment needs to be effectively protected. The EC Court must not stop therefore at the point of combating the abuse of law. It has to assure at the same time that national tax law measures will not unreasonably put restrictions on one of the fundamental freedoms that can be exercised in the internal market.

Our thesis in this paper is that the EC Court cannot make a link between the two opposite goals unless it has recourse to legal autopoiesis. It will not be successful in striking a balance between the two extremes unless it is able to create "order from noise", by starting to apply the equivalence principle to a direct tax case in parallel with the aspiration of stopping tax avoidance. The equivalence principle purports that both ideas need be protected equally and simultaneously: citizens need be prevented from the abuse of law, but they need

[22] C-56/01 Patricia Inizan, European Court Review 2003. I-12403, Para. 60.

[23] C-446/03 Marks & Spencer, European Court Review 2005. I-10837, Para. 59, opinion of AG L. Poiares Maduro, Paras 76–77.

be assured at the same time that they will not be prevented from exercising fundamental freedoms.

The EC Court is taking a hard look at whether the taxpayer has fully exhausted the possibilities of loss carry over, including all affected jurisdictions. If not, legal autopoiesis is not invoked. If so, it is because the grant of a last resort shall be accompanied with the warning given about avoidance and abuse.

The assumption of equivalence is of a theoretical nature. It starts operating, however, where communication between the jurisdictions of Member States is a problem. National jurisdictions are not requested to be unified. They are, however, expected to be compatible with each other, and national public authorities need to start communicating with each other accordingly, whenever it is necessary.

The assumed operation of legal autopoiesis is not static. The legal positions to be taken will depend on how particular factual circumstances will be developed. They are thus open to changes that will be elaborated, provided that the legal acts associated with these changes will be successful, leading to communication with a view to reaching balance and coherence in the case under discussion. This is the filtration effect by law of the non-legal environment. The non-legal considerations of combating avoidance and abuse are not refuted, and they are not accepted either: instead, they are digested and reformulated. Legal autopoiesis is thus a matter of dynamics.

One can learn from the case of C-446/03 Marks & Spencer that tax law does not resist economic reality; rather, it starts reshaping economic reality from non-law into law. In tax cases, conflicts do not arise between law and economic policy in and of itself but between law and economic policy–as they stand at the outset–and the redefined law that appears at the end of the process of communication between the factors of law and non-law.

The emergence in tax law of anti-avoidance rules is not a matter of the intrusion of economic policy considerations into the body, form or language of tax law, but the corollary of the collapse of traditional legal institutions that are not able to provide taxpayers any longer with sufficient guidance. The emergence of anti-avoidance rules is the consequence of a failure of the law used up to the time when taxpayers become engaged in tax avoidance. A court decision that reflects a problem of tax avoidance does not lead simply to the assertion of a new type of law. It can happen to do so only if legal and non-legal systems go through the filter of self-referential law, producing a new order of law. This is precisely what happened in the case of C-446/03 Marks & Spencer: the EC Court spelled out the law on granting a taxpayer a last resort, following the exhaustion of all opportunities for loss carry over across the border.

(iv) A micro perspective of the approximation of national laws in direct tax matters

The work of autopoiesis is largely constrained by the outward (non-legal) society. It can only emerge where the process of functional differentiation has reached a sufficiently high level of social consensus and welfare. Where poverty and degradation prevails, no autopoiesis can be developed. Autopoiesis is not a macro category of social structure. It can only occur as an exception, that is, from time to time where all the conditions for its development are fulfilled.

Importantly, the autonomy of a legal system can only be interpreted from case to case. The standpoint taken by the ECJ in C-446/03 Marks & Spencer suggests the approximation of Community law, although not by way of statutory legislation. As an alternative to the bureaucratic coordination of Member States, harmonisation can be achieved, although in the micro sphere of the judgment made in C-446/03 Marks & Spencer. This micro perspective of harmonisation also means that it must be redefined in another legal case. What has been stated in C-446/03 Marks & Spencer is not necessarily valid in another case. It is therefore a matter of communicative legal acts to be taken whether a new quality of legal autonomy and coherence is developed in a new case, again in a micro situation.

A major source for harmonisation is not necessarily the Member States' agreement of their political will top-down. One has to explore citizens as well who may experience restrictions on their exercise of fundamental rights from case to case, due to the lack of harmony in the Member States' statutory legislation. In such cases, it is ultimately not the question of harmonisation that can be raised. Instead, it is the enforcement of civil rights, which is at stake. Harmonisation, if any, is the inadvertent consequence of creating the possibility of the enforcement of civil rights. This is a micro perspective of harmonisation, which still does not invalidate the relevance of agreements on harmonisation, to be made on a macro level of the institutions of official policy.

Micro-level harmonisation might be seen as a reason for generating casuistic legislation in the instance that the issue of correcting national legislation arises from the limited outlook of the specific problem. This correction must still not be considered as a new branch of national legislation. Instead, the legislator's goal is to make adjustment to national laws in order to achieve harmony in implementing national law in line with its counterpart, effective in the other Member State. The adjustment required by the individual case can take place in terms of modifying the respective national law, releasing implementation decrees or guidance for the interpretation of the law applicable to the case, with a view to bringing national law in accordance with its counterpart. This

process can be seen as a matter of adjustment rather than the creation of new law in a spontaneous way.

With regard to the above ECJ cases, we need not require from France to change its law on social security. It can even be maintained that the French legislator does not have to do anything other than to harmonise the implementation of rules on the reimbursement for the costs of the hospital treatment made outside France with the fundamental freedoms of the EC Treaty. The UK is not expected to change its tax system of loss carry over either. It is only important to assure that the UK tax law is to be read in accordance with the EC Treaty and, if necessary, make provisions to ensure that exceptional foreign losses can be recognised for domestic tax purposes despite the missing fiscal nexus, provided that the taxpayer does not have an opportunity to effectuate loss carry over for tax purposes in any of the affected jurisdictions. In these cases, a Member State is invited to amend its legal practice in order to avoid impeding the exercise of fundamental freedoms. It is up to the Member State to determine which legislative or other measures will be taken to achieve the desired harmony.

3. *Evolution from diffusion into coherence: reconciliation of conflicting principles (constructing a hyper-cycle) and showing sensitivity to tax competition (internalisation)*

The evolution of an autopoietic legal system can be explained (i) by a hyper-cycle of the development of diffuse law into autonomy and coherence, and (ii) by means of internalisation, that is, by coupling with major social developments. The particular law that has been applied in C-446/03 Marks & Spencer has not existed before. It has been developed through the various processes of communication followed by the lawyers specialising in tax law, Community law and public international law. There were judges, EC servants, legal advisers and scholars both in the UK and abroad who pursued the disputes.

It was not clear in advance of this process of communication, what emphasis should be placed on the different principles of Community law that could be applied to a case like that of C-446/03 Marks & Spencer. In particular, it was not clear in which combination these principles could be applied. Due to the hyper-cycle of the development of the Community tax law related to C-446/03 Marks & Spencer, diffusion could be transferred into coherence. Diffusion has been turned into coherence as a result of reconciling with each other the principles of fiscal cohesion and the non-restriction of fundamental freedoms. It has been possible to forge a particular quality of law–this has achieved a fine

balance–, which can still be interpreted from opposite directions, depending on where the emphasis is placed in fact.

In addition to the hyper-cycle of the development of the relevant Community law, coupling with social changes was also necessary. It was not possible to take out of consideration that Members States have been all the more susceptible to preserving their sovereignty in legislating their own national tax system. At the same time, it must not be disregarded either that EC freedoms would be undermined if it were precluded to give special relief in specific circumstances, and remove administrative barriers accordingly from the smooth operation of the internal market.

Furthermore, the EC Court of Justice struck a particular balance as a result of coupling with the Member States current policies. In the case of C-446/03 Marks & Spencer, it was first of all at stake as to how policy expectations will be reflected in the ECJ judgment to give more emphasis to the subsidiarity principle and to stop tax competition. Following the accession in 2004 of a number of law tax jurisdictions, a new meaning had to be given to the internalisation of Community law at a particular phase of its development. Sensitivity to the harmful effects of regulatory and tax competition, or to the abuse of Community law could not be taken out of consideration any longer. At the same time, the achievements of the internal market legislation could not yet be given up.

4. *Structural couplings: exploring the obstacles to Community law freedoms and identifying the legal basis for the removal of these obstacles in a changing environment*

It is a question whether an autopoietic system of law, once it has been developed, is able to survive despite the changes in its environment. This suggests the task of (i) filtering the diverse interpretations of the materiality continuum, and (ii) identifying the components that may qualify the events in several meaning processing systems, relevant to the specific legal case. The materiality continuum arising from outward meaning bases is manifested in restrictions by national legislation on fundamental freedoms that need to be overcome. Disparities in national tax laws cannot be considered taken by themselves as obstacles to the exercise of EC freedoms. Hence, they are not to be eliminated, except in cases where the different legal forms of different jurisdictions are comparable with each other. However, coherence in Community law cannot be achieved unless one day the dispersion and diffusion, arising from the differences in national legal measures is removed.

In addition to the filtration of outward influences (by way of information processing), identifying complex events (as external constraints) is also important. Disparities arising from national loss relief regimes parallel to each other need to be removed, in the event that they impede the smooth operation of the internal market. For instance, a Member State may be in a position to choose legislative means that serve the integrity of the national tax system, but which are still less restrictive than they would otherwise be.

It can be important to encounter the changing external constraints on the process of internal information processing. Openness of an autopoietic legal system to energy flows means that it is vulnerable to outward changes in meta-juridical values. Where non-legal values are not digested and built in the particular micro-system of law, coherence cannot be achieved that would otherwise be necessary for the development of autonomy, or rather of the self-generation of the system itself. A vast array of the possible solutions, proposed by the profession of Community tax lawyers has been filtered by the EC Court of Justice, arriving at a decision in the case of C-446/03 Marks & Spencer. The communicative process of developing the particular law, which can provide the basis for a final decision, has not yet been concluded by the ECJ decision. The national court, deciding eventually in the case, may have much elbowroom in formulating its final standpoint. To date, it has been the practice of the EC Court to leave all the more room for the national court to assess the relevant circumstances, and freely decide the case on its merits.

III. Lessons to be taken from the angle of the legal autopoiesis theory

1. Filling the gap left in national law by the recursively closed organisation of interpreting and applying Community law

A vocabulary of analysing the texts of the ECJ judgment, the AG opinion and the national court decisions following the ECJ judgment may consist in particular of the following terms:

– legal acts as communicative events;

– normative closure and openness in cognition, order from noise, reflexive law;

– hyper-cycle of pre-autopoietic evolution, internalisation upon post-autopoietic evolution; and

– structural couplings (internal information processing and coping with external constraints).

The Community law principles applicable to the case of C-446/03 Marks & Spencer deliver arguments in two opposite directions. Some of them serve for

the protection of the UK sovereignty in legislating direct tax matters; others can be used in favour of the taxpayers' freedom of establishment. The principles that belong to the first type are as follows:

- territoriality principle of taxation; and
- fiscal cohesion principle.

The principles that belong to the second type can be enumerated as follows:

- proportionality principle;
- equivalence principle; and
- effectiveness principle.

It is not difficult to follow the ECJ argument aimed at the protection of the Member State's position on the ground of the territoriality principle. Nor is it problematic to apply the fiscal cohesion principle either as a means of justifying restriction on the freedom of establishment. Furthermore, its meaning has even been broadened significantly to the extent that fiscal cohesion can now be interpreted widely, that is, not only in respect of the same taxpayer and the same item of tax liability.

By way of contrast, it is a novelty of the ECJ decision to see the way in which the proportionality principle has been utilised. It was used until the time of the decision in C-446/03 Marks & Spencer in the sense that restrictive national measures can be challenged or approved, depending on whether they meet the proportionality test. The ECJ decision is new, however, at the point of C-446/03 Marks & Spencer that the UK national legislation is subject to the proportionality test in the instance where there is no explicit restriction by national law on an EC freedom that would be plainly inconsistent with Community law. The proportionality principle would then be left in a vacuum. This is not yet the case in point because the gap arising from the lack of explicit restrictive national law measures is filled by the special meaning of Community law, suggested by the profession and represented by the ECJ. The expression of this meaning is a result of the recursively closed organisation of interpreting and applying Community law. The law–generated as an order from noise–is the result of the redefinition of Community law, without interfering yet with the sovereignty of a Member State in legislating direct tax matters. The law that has been developed in deciding the case of C-446/03 Marks & Spencer is the product of self-generation, that is, it has been developed in the absence of a peculiar legislator who would have been authorised to adopt the applicable law.

A key to understanding the decision in C-446/03 Marks & Spencer resides in the EC Court's assessment of whether the opportunity of loss carry over for the company group has been fully exhausted in the particular case. It is not the UK law, strictly speaking, which is being evaluated. No single legal measure of the UK tax law has been condemned in the abstract. It is the UK legal

practice that has been condemned, not proven friendly enough in a particular case. No statutory provision of the UK tax law has been challenged. The UK law has been criticised, however, because its impact has been detrimental, constituting a restriction on the taxpayer's right for cross-border loss carry over. This way, the UK law has resulted in an infringement of the effectiveness principle, not providing the taxpayer any guarantee for the effective protection of his or her rights.

Interestingly, the follow-up UK legislation has in fact resisted the Community law developed in C-446/03 Marks & Spencer, having implemented the ECJ decision. The UK reaction to the ECJ challenge was to make changes in statutory law,[24] the result of which has been the introduction

– of a statutory regime that allows in principle the carry over of qualifying cross-border losses; and

– of detailed provisions made in the Finance Act 2006 on the conditions, in which a UK company group is in a position as to know whether it has exhausted the possibilities to have the loss taken into account in the jurisdiction of a non-resident subsidiary.

Importantly, on 10 April 2006 the High Court gave its judgment on the question as to what the relevant time is at which point the parent company has to demonstrate that all possibilities have been exhausted in order to take into account for UK tax purposes the losses sustained by the overseas subsidiary. The High Court ruled that the relevant time for determining if conditions exist for cross-border group relief is the later time when the group relief is claimed, not when the losses arise. This position is consistent with the logic arising from the principles of equivalence and effectiveness. However, it is different from the said provisions of FA 2006.

The main issue is still not whether the reaction of the UK legislation is severe or generous for the purposes of the exercise of taxpayer rights. It is more important to emphasise that the UK legislator was quick in filling the gap left by the case of C-446/03 Marks & Spencer, breaking the process of self-generating Community law. It is not precluded, however, that the interpretation of the principles of effectives and equivalence will receive fresh impetus from

[24] The UK has already revised its group relief laws, allowing qualifying losses from an EEA subsidiary to offset income of a UK parent company (with a 75% ownership at least). The UK has still introduced provisions in the Finance Act 2006 to give effect to the ECJ Marks & Spencer decision. As a result, the FA 2006 provisions are very difficult to satisfy. See: Downs, A.: Marks & Spencer: A case for pro-European tax harmonization. *The CPA Journal*, 78 (2008) Jan. Commission Communication on the tax treatment of losses in cross-border situations [SEC (2006) 1690], COM (2006) 0824 final.

the profession by developing new aspects of the old principles, from now on based on new statutory law.

2. *Conclusions*

It is clear from the above analysis that

– the legal actions (statements, explanations, arguments, etc.) of the legal representatives of taxpayers and of public authorities, finding and applying the proper law cannot be described as simple equivalents of naked statutory law structures, like the UK loss relief regime (this development is associated with a phenomenon that can be called the temporalisation of legal institutions);

– normative closure and cognitive openness can be developed due to the combined effect of the concurrent application of the principles of fiscal cohesion, the non-restriction of fundamental freedoms and the effective enforcement of rights, applicable in a particular context to the case of C-446/03 Marks & Spencer (simultaneous view of a single case);

– a peculiar legal order as a new quality of Community law can be developed (one can explore order from noise) due to the emergence of the equivalence principle applicable to direct tax matters in parallel with the aspiration of stopping the trafficking in losses (emergence of the idea of equivalence);

– the judgment in C-446/03 Marks & Spencer is bounded to the particular time when the taxpayer, seeking to get access to cross-border loss carry over, is granted a last resort, following the exhaustion of all the opportunities that would have been available for him or her before (striking a balance);

– harmonisation can be achieved on a micro level as a consequence of creating the possibility of the enforcement of taxpayers' rights, while not invalidating the relevance of legislative steps, taken by Community bodies on a macro level of official policy (happening on a micro level);

– reconciliation of conflicting principles with regard to reaching equilibrium between national and Community law (constructing a hyper-cycle of pre-autopoietic evolution) is possible, and sensitivity of public bodies to the harmful effects of tax competition, or to the abuse of Community law (internalisation upon post-autopoietic evolution), is growing (evolutionary aspect of autopoietic law); and

– filtration of diverse interpretations of law and digesting the changing external constraints on the ECJ practice made in direct tax matters are necessary (producing structural couplings).

It follows from the above that the theory of legal autopoiesis, as applied to the case of C-446/03 Marks & Spencer, seems to show the characteristics as enumerated below. Thus, it

– explores temporality in law;
– comprises simultaneous events;
– embraces the idea of equivalence;
– is able to strike balances;
– is understandable on a micro level;
– brings about reconciliation of conflicting ideas and sensitivity to crisis phenomena; and
– contributes to the filtration of diverse interpretations of law and to the removal of discrepancies.

There are a few policy issues that can be raised in connection with the application of the legal autopoiesis theory to the case of C-446/03 Marks & Spencer. They can be summarised as follows:

(i) Does it make sense that relief should be available only where there is no relief in the jurisdiction of the subsidiary? How would foreign rules that terminate the right to loss set-off after a period fit into this framework?

(ii) Why should a group be entitled to relief in respect of the losses of the foreign subsidiary when the group did not have to pay tax on the subsidiary's profits?

(iii) If a Member State allows the free export of capital by taxpayers, why should it have to allow free export when the taxpayer decides to establish a subsidiary? Are EC Treaty rights for the benefit of humans or of companies? Why should a company, which is fictional, be entitled to the rights of this kind?

The above questions can be answered in brief as follows:

(i) Yes, it does. For the UK, it is important to preserve the integrity of its national tax system and resist the trafficking in cross-border losses. This is a materiality continuum (as explained by Luhmann), however, that needs to be taken into account. It should be overcome as long as national tax legislation endangers the exercise of EC freedoms, in particular, the freedom of establishment. Foreign rules on the carry over of losses need not be taken into account in general. However, the UK is obliged to check if the opportunities of setting off foreign losses have been exhausted. If so, the UK has to provide a last resort, which comes from the normative closure of the Community law, applicable to the case of C-446/03 Marks & Spencer. A new order can be developed from noise to the extent that a balance can be reached between the tax competences

retained by the Member States and the requirement of the freedom of movement, flowing from the idea of the internal market. For the achieving of this result it is also required that the normatively closed Community law applicable to this case be cognitively open.

(ii) A company group could be entitled under national law to the UK relief of the transfer of cross-border losses even if no tax is paid on the profits of the subsidiary in the UK because the lack of this relief would discourage the UK parent company from extending its business to another Member State through forming a subsidiary there. This position comes from the equivalence principle applicable now to a direct tax case. According to this principle, to have useful effect, Article 43 EC requires the national authorities competent to grant the tax advantage at issue to take account of the advantages likely to be afforded by the legislation of the state, in which the subsidiaries of the group are established. This solution comes from the reflexive nature of Community law. By virtue of this reflexive nature, the national tax law need not be changed. A Member State is still required to give a last resort if there is no alternative to the restrictive national law on cross-border loss carry over. Otherwise the freedom of establishment–an integral part of the operation of the internal market–would be unjustifiably restricted.

(iii) The EC Treaty has been designed for European citizens. This comes from the requirement of free competition and the smooth operation of the common market–from 1993 on, the internal market–whereby citizens may widely benefit from the principles of the free movement of goods, persons, services and capital. The freedom of establishment arises from the freedom of citizens to extend their business to another Member State by establishing there their branches or subsidiaries (freedom of persons) there. According to the ECJ practice, the freedom of establishment can be carved out from the free movement of capital where citizens (or companies) can exercise decisive influence over their vehicle of investment made in another Member State. It can neatly be explained by means of the legal autopoiesis theory why companies–a legal fiction–may be entitled to exercise rights that are otherwise available for citizens. Corporations can be seen from the viewpoint of the corporatist phenomenology in a process of collectivisation where groups can emerge as the instrument of gathering and enforcing individual interests. A corporation as a legal entity can be interpreted in the light of reflexive law. In order to grasp the substrate of a legal person, it is not sufficient to refer to a system of actions, to the group of persons, to peculiar funds or to decision schemes. Rather, it is necessary to get involved in the analysis of reflexive communication as

well. To this end, a business organisation must be discerned as a unit of the process of collectivisation. The two sides of collectivism are the realm of collective imagination (solidarity as interpreted by Parsons) and the reality of the corporative body (capacity for actions in concert as suggested by Parsons).[25]

IV. Appendix

(i) Main proceedings in the C-446/03 Marks & Spencer v. David Halsey case as summarised by the ECJ in its judgment

"18 Marks & Spencer is a company incorporated and registered in England and Wales. It is the parent company of a number of companies established in the United Kingdom and in other States. It is one of the leading United Kingdom retailers of clothing, food, homeware and financial services.

19 From 1975 Marks & Spencer began to move into other States, with the opening of a store in France. By the end of the 1990s it had sales outlets in more than 36 countries, with a network of subsidiaries and a system of franchises.

20 A trend towards increasing losses became evident in the mid-1990s.

21 In March 2001 Marks & Spencer announced its intention to divest itself of its Continental European activity. By 31 December 2001 the French subsidiary had been sold to third parties, while the other subsidiaries, including those established in Belgium and Germany, had ceased trading.

22 In the United Kingdom, Marks & Spencer claimed group tax relief pursuant to paragraph 6 of Schedule 17A to the ICTA in respect of losses incurred by its subsidiaries in Belgium, Germany and France for the four accounting periods ended 31 March 1998, 31 March 1999, 31 March 2000 and 31 March 2001. It is clear from the file before the Court that both parties to the main proceedings agree that the losses must be computed on a United Kingdom tax basis. At the tax authority's request, Marks & Spencer therefore recomputed the losses on that basis.

[25] Teubner, G.: Unternehmenskorporatismus. *Kritische Vierteljahresschrift*, 3 (1987) 70; Ackermann, Ch.:–Parsons, T.: The concept of 'social system' as a theoretical device. In: McQuarie D. (ed.): *Readings in contemporary sociological theory*... [from: Direnzo (eds.): Concepts, theory and explanation... *op. cit.*]

23 Each of the subsidiaries had operated in the Member State in which it had its registered office. The subsidiaries had no permanent establishment in the United Kingdom and had never traded there.
24 The claims for relief were rejected on the ground that group relief could only be granted for losses recorded in the United Kingdom.
25 Marks & Spencer appealed against that refusal before the Special Commissioners of Income Tax, which dismissed the appeal."

(ii) Expression of the legal autopoiesis theory in the wording of the judgment of C-446/03 Marks & Spencer

The particular statements of the judgment and the AG opinion can be structured, depending on how they are associated with the components of the legal autopoiesis theory. The result of this is depicted in a series of tables below.

Components of legal autopoiesis theory	AG opinion	ECJ judgment
Legal acts as communicative events, taxpayer claims and tax authority reaction–looking behind the pure legal facts	It is neither the intention, nor the avowed aim of Community law to call in question the limits inherent in any power of taxation or to disturb the order of priority of the allocation of tax competences as between Member States; it should be recalled that, in the absence of Community harmonisation, the Court is not competent to interfere in the conception or organisation of the tax systems of the Member States (Para. 60)	... it is clear from the file before the Court that both parties to the main proceedings agree that the losses must be computed on a United Kingdom tax basis; at the tax authority's request, Marks & Spencer therefore recomputed the losses on that basis; each of the subsidiaries had operated in the Member State in which it had its registered office; the subsidiaries had no permanent establishment in the United Kingdom and had never traded there. (Paras 22–23)

Components of legal autopoiesis theory	AG opinion	ECJ judgment	Post ECJ history
Normative closure and openness in observation; order from noise– application of the principles of proportionality and effectiveness in the absence of explicit national law measures that would infringe Community law	The proposed judgment is a solution, which requires the authorities of the Member State concerned to take account of the tax situation of companies not resident in its territory; being complex, yet in the absence of Community harmonisation, only a solution of this kind allows a *balance* to be maintained between the tax competences retained by the Member States and the requirements of freedom of movement flowing from the internal market (Para. 83)	The restrictive measure at issue in the main proceedings *goes beyond what is necessary* to attain the essential part of the objectives pursued where: – the non-resident subsidiary *has exhausted the possibilities available* in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, ... (Para. 55)	The High Court ruled that the relevant time for determining if conditions exist for cross-border group relief is the later time when the group relief claim is made, not when the losses arise (otherwise the parent company could hardly make use of the transfer of cross-border losses)

Components of legal autopoiesis theory	AG opinion	ECJ judgment
Reflexive law–application of the equivalence principle (no interference with the national legislation on its merits)	It follows that the margin of manoeuvre granted to the Member States in order to justify their tax regimes is excessively reduced; for that reason, it is necessary, as Advocate General Kokott recommended, to relax those criteria; to that end I propose to revert to the criterion of the aim of the legislation at issue; cohesion must first and foremost be adjudged in light of the aim and logic of the tax regime at issue (Para. 71) Justification based on cohesion of the system of relief can be accepted only if the foreign losses may be accorded equivalent treatment in the State in which those losses arise (Para. 76) A solution of that kind based on the comparison and equivalence of the treatment accorded in various Member States has already been developed by the Court in regard to health services in the context of national social security systems (Para. 77)	

Components of legal autopoiesis theory	AG opinion	ECJ judgment	Post ECJ history
Hyper-cycle of pre-autopoietic evolution–reconciliation of conflicting considerations (reaching equilibrium)	The *conflict* between the power conferred on the Member States to tax income arising in their territory and the freedom conferred on Community nationals to establish themselves within the Community cannot be saved; this gives rise to a *tension* between two opposing systems and to the need to establish an *equilibrium* in the allocation of competences as between the Member States and the Community (Para. 6)	The fact that it does not tax the profits of the non-resident subsidiaries of a parent company established on its territory does not in itself justify restricting group relief to losses incurred by resident companies (Para. 40)	
Internalisation upon post-autopoietic evolution–showing sensitivity to a new accent of harmonisation (showing more sensitivity to tax competition)	The national legislation is not precluded from making entitlement to cross-border loss relief subject to the condition that it is established that the losses of subsidiaries resident in other Member States cannot be accorded *equivalent* tax treatment in those other Member States (Para. 82)	Member States are free to adopt or to maintain in force rules having the specific purpose of precluding from a tax benefit *wholly artificial arrangements* whose purpose is to circumvent or escape national tax law (Para. 57)	Lack of internalisation by making changes in the UK statutory loss relief regime

Components of legal autopoiesis theory	AG opinion	ECJ judgment
Materiality continuum–restrictions by national legislation to be overcome	Within the group the claim is made by the parent company resident in the United Kingdom which is subject under that head to unlimited fiscal obligations in that country; in regard to it the tax competence of that Member State is not limited; in those circumstances the United Kingdom is not entitled to rely on the principle of territoriality in order to refuse to a company within a group resident in its territory the grant of an advantage connected with the transfer of losses (Para. 63)	The United Kingdom and the other Member States which submitted observations in the present proceedings claim that, from the aspect of a group relief system such as that at issue in the main proceedings, resident subsidiaries and non-resident subsidiaries are *not in comparable tax situations*; in accordance with the principle of territoriality applicable both in international law and in Community law, the Member State in which the parent company is established has no tax jurisdiction over non-resident subsidiaries (Para. 36)
Identifying the particular meaning of simultaneous events–removing disparities arising from national loss relief regimes parallel to each other, provided that they impede the smooth operation of the internal market	The difficulties ensuing for economic operators as a result of mere differences in tax regimes as between Member States are outside the scope of the EC Treaty; in particular it is well established that the differences in treatment resulting from *legislative disparities* as between the Member States do not constitute discrimination prohibited by the Treaty (Para. 23)	In so far as it may be possible to identify other, *less restrictive* measures, such measures in any event require harmonisation rules adopted by the Community legislature (Para. 58)

(iii) Key terms relating to the legal autopoiesis theory: temporality, closure and openness, evolution and structural couplings

Temporalisation:	there are not legal facts, but events; legal acts are communicative events that change legal structures.
Interpreting of how the legal system can be open and closed at the same time:	– closure and openness refer to different domains of the legal system (Luhmann: normatively closed, cognitively open); – legal closure implies legal openness (order from noise–Atlan: le crystal et le fume); – reflexive law (Teubner); and – self-transcendence of a normative order (Dupuy).
Evolution of the autopoietic legal system (Teubner):	– construction of a hyper-cycle (pre-autopoietic evolution–socially diffuse law develops higher forms of autonomy via the cyclical constitution of its system components); and – internalisation (post-autopoietic evolution–legal development is coupled to broader social developments by specific mechanisms of co-evolution).
Interpreting changes in the environment:	a distinction between internal information processing and external constraints needs to be taken into consideration (Ashby: a cybernetic system is open to energy but closed to information and control); there are two mechanisms of environmental couplings: – materiality continuum is the material-energetic basis of meaning systems; and – simultaneous presence of events in several meaning processing systems.

(iv) Table: Legal autonomy and autopoiesis[26]

Legal autonomy	Legal autopoiesis
Independence from internal factors	Operating a particular selective mechanism for responding to the environment
Autonomy is a matter of degree, ranging from autarchy to total dependence	Autopoiesis is an all or nothing category
Independence as freedom from outside control	Independence as self-dependence
Non-correspondence to other social factors	Reflexivity (circularity)
Responsive to plurality of interests	Self-observation
Justification of legitimacy	Operating according to its own code
Derives from institutional (e.g., organisational), occupational (e.g., legal profession) and procedural specialisation	Derives from functional differentiation of subsystems
Ideal of separation of powers and rule of law	Maintaining evolutionary complexity and avoiding de-differentiation
Limits of law's ability to transcend political and economic interests	Internal limits on law's conditional programmes
On an ontological axis, law can be seen as distinct from society according to the mainstream law and society studies (e.g., Kelsen: imputation versus causality theory)	On an ontological axis, law can be seen as inseparable from society according to alternative law and society studies (e.g., Luhman, Teubner)
On an epistemological axis, society can be seen as being independent of law as its object (e.g., theories of the capitalist mode of production, of social action, etc.)	On an epistemological axis, law can be seen as a competing discourse with sociology (e.g., Teubner's theory on reflexive law)

[26] Nelken, D.: Changing paradigms in the sociology of law. In: Teubner, G. (ed.): *Autopoietic law: A new approach to law and society.* Berlin–New York, W. de Gruyter, 1988. 196–197, 210.

(v) Table: Types and dimensions of modern legal rationality[27]

Dimensions	Types		
	Formal	Substantive	Reflexive
Justification of law	The perfection of individualism and autonomy: establishment of spheres of activity for private actors	The collective regulation of economic and social activity, and compensation for market inadequacies	Controlling self-regulation: the coordination of recursively determined forms of social cooperation
External functions of law	Structural promises for the mobilisation and allocation of resources in a developed market-oriented society and for the legitimation of the political system	The instrumental modification of market-determined patterns and structures of behaviour	Structuring and restructuring systems for internal discourse and external coordination
Internal structures of law	Rule-orientation: conceptually constructed rules applied through deductive logic	Purpose-orientation: purposive programmes of action implemented through regulations, standards and principles	Procedure-orientation: relationally oriented institutional structures and decision processes

[27] Teubner, G.: Substantive and reflexive elements in modern law. *Law and Society*, Vol. 17, No. 2 (1983), 257.

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Arbitration in South America–with Special Regard to the Appointment and Challenge of the Arbitrator

Abstract. The present study discusses some important questions on arbitration in Latin-America focusing on the issue of appointment and challenge of arbitrators. The author attempts to describe some characteristic features of arbitration in Latin-America paying particular attention to the impact of the Calvo Doctrine and Calvo Clause. The author also discusses the significance of the so-called compromiso (or in Portuguese: compromisso). The author gives a detailed analysis on the appointment and challenge of arbitrators in the legal system of Argentina, Brazil, Chile and Mexico, highlighting also some leading cases in this issue. The study enumerates some important arbitration institutes in these countries, as well. The author puts emphasis on introducing the legal regulation on arbitration of the foregoing countries taking into consideration the legal tradition, which might have significant influence on the present legislation and legal practice, as well. As the law on arbitration in some of the foregoing countries in many aspects follow the regulations of UNCITRAL Model Law, the author tries to compare the analyzed acts with the UNCITRAL Model Law, which served and serves as a guideline for arbitration law in several countries of Latin America.

Keywords: international commercial arbitration, Latin America, UNCITRAL Model Law, Appointment and Challenge of Arbitrator

I.

It is obvious that the South American legal systems, specifically the development of private law were influenced to a high extent by the European legal traditions–including Roman law.[1] The international commercial arbitration, the

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[1] For the subsequent history of Roman law in South America, see: Hamza, G.: *Az európai magánjog fejlődése. A modern magánjogi rendszerek kialakulása a római jogi hagyományok alapján* [Trends of the Development of Private Law in Europe. The Role of

dispute resolution method[2] which won particular popularity in the European and American legal systems in the previous century, however, remained playing different role in the Latin American region in the recent past and to some extent in the present time.

Alejandro M. Garro in his essay published in the 1980's puts that South American legislation does not provide favourable conditions for arbitration.[3] As it is noted by Claudia Frutos-Peterson in a publication in 2002, it is long established within the field of international law that the Latin American region is unwilling to use this dispute resolution system. In Frutos-Peterson's view, the legislation related to international commercial arbitration is not as "healthy" as it could be.[4] Taking into consideration these remarks, in the present study I deal with the South American commercial arbitration focusing on certain issues concerning the appointment and challenge of the arbitrator, considering the novel tendencies of legislation. In this essay I also analyse the regulations of Argentina, Brazil, Chile and Mexico separately.

If we scrutinize the history of international commercial arbitration it may seem odd to state that international commercial arbitration is often applied between the foreign investor and the host state, or one of the entities of the host state or a business domiciled in the host state. This can be interpreted together with the traditional advantages of commercial arbitration.[5] Foreign investors, however, can only resort to international commercial arbitration as an alternative dispute resolution method if the appropriate legal conditions are

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the Civilian Tradition in the Shaping of Modern Systems of Private Law]. Budapest, 2002. 275–276. For the relationship between the Latin American legal systems and Roman law see: Catalano, P.: A ma is élő római jog: a világ nagy jogrendszerei és a római jog [Roman Law Still Existing Nowadays: The Most Important Legal Systems and Roman Law]. In: *Tanulmányok a római jog és továbbélése köréből. I.* Budapest, 1987–1988.

[2] As it was noted by Iván Szász in an interview: *"It has an eminent national and international career [i.e. commercial arbitration] which is still going on."* See: http://vg.hu/index.php?apps=cikk&cikk=116366.

[3] Garro, A. M.: Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America. *Journal of International Arbitration*, 1 (1984) 320.

[4] Frutos-Peterson, C.: *International Commercial Arbitration in Latin America: As Healthy as It Could be?* See: www.texasadr.org/intlarb.cfm.

[5] For the advantages of arbitration particularly see: Gellért, Gy.: *Új törvény a választottbíráskodásról* [New Act on Arbitration]. *Magyar Jog*, 45 (1995) 451–452. From the subsequent Hungarian literature about the international commercial arbitration and its importance, see: Horváth, É.–Kálmán, Gy.: *A nemzetközi eljárások joga, különös tekintettel a választottbíráskodásra* [Law of International Procedures, Especially Arbitration]. Budapest, 1999; Vörös, I.: *A nemzetközi gazdasági kapcsolatok joga* [Law of International Commercial Relations]. III. Budapest, 2004. 266–275.

available. The legal systems in South America are not homogeneous–in spite of the considerable linguistic similarity. We can state, however, that South American legal systems were averse to foreign investors up until the latest legislation.

We can ascertain that the theoretical basis for this phenomenon is the so-called *Calvo Doctrine*. The Doctrine was established by Carlos Calvo, a diplomat and legal scholar in Argentina in the 19th century.[6] The Calvo Doctrine says that foreign investors shall be under the jurisdiction of the country where they invest into, therefore they shall be subject to the same judgement as persons domiciled in that country. Bernardo M. Cremades–who drew attention to the re-emergence of the Calvo Doctrine–summarized the importance of the Doctrine as follows: (i) the host state is requested by international law only to provide similar treatment to foreign investors and domiciled persons, (ii) the activities of foreign investors are governed by international law, (iii) the courts of the host state have exclusive jurisdiction over the disputes of the foreign investors.[7] It is obvious that the Calvo Doctrine did not serve the emergence of the international arbitration. The fact that the Doctrine did not only influence the commercial legislation of the South American states, but even certain constitutions also, illustrates the high impact of the Calvo Doctrine. The Mexican constitution of 1917 provides that–concerning their properties in Mexico–foreign investors cannot invoke the aid of their own government. Regarding the fact that Mexico is a member of the North American Free Trade Agreement (NAFTA), this provision shall not be applied in relation to the member states of the agreement. It shall be noted that Luis Maria Drago also went along with the Calvo Doctrine. Drago–who was a diplomat, lawyer and foreign minister in Argentina–established the *Drago Doctrine* which prohibited the aggressive efforts of foreign states to recover debts.[8]

The Bolivian constitution still contains the provision which provides that natural persons and undertakings are under the Bolivian jurisdiction; therefore they cannot claim any extraordinary treatment or diplomatic protection.[9] The constitution of Colombia provides the same. By interpreting these regulations we can observe that it was the Calvo Doctrine and the subsequent legislation

[6] See: Calvo, C.: *Le droit international théorique et pratique*. Paris, 1896.

[7] See: Cremades, B. M.: Resurgence of the Calvo Doctrine in Latin America. *Business Law International*, 7 (2006) 54.

[8] In this regard see: Grigera Naon, H. A.: Arbitration and Latin America: Progress and Setbacks. *Arbitration International*, 21 (2005) 135.

[9] For the texts of the constitutions of the Latin American states visit www.georgetown.edu.

that substantially hindered the implementation of international commercial arbitration in the Latin American states.

Resulting from the Calvo Doctrine the so-called Calvo Clause was adopted in transactions related to foreign investments. This clause explicitly emphasized in the contracts that any dispute shall be settled by the *fora* of that state, based on the domestic legislation.[10] The omission of the Calvo Doctrine was reached with certain bilateral agreements which were concluded in order to promote foreign investments. These agreements made it possible to stipulate arbitration in contracts. However, the influence of the Calvo Doctrine can be observed in early bilateral agreements too. For instance, one of such agreements (concluded by Argentina), provides that arbitration can only be commenced if a local court has already decided the case; or a particular period of time passed after a lawsuit had been initiated, and the court did not reach a judgement.[11] This rule regarded the exhaustion of the opportunities for legal remedy provided by the state as a prerequisite of commencing arbitration. This rule is fundamentally contradictory to the purpose of the international commercial arbitration or the arbitration in general.

The influence of the Calvo Doctrine can be observed in relation to the Andea Treaty which was concluded on 30th November, 1977 by Bolivia, Colombia, Ecuador, Peru and Venezuela. Its purpose was the regulation of foreign investments. Decision Nr. 24 regarding the treaty excluded the application of foreign laws and the jurisdiction of foreign courts, including arbitral tribunals, concerning foreign investments and the reception of foreign technologies.[12]

II.

These bilateral agreements, the conclusion of certain international treaties and their ratification, moreover the practic e resulting from them essentially contributed to the adaptation of arbitration in the Latin American region.[13]

[10] About this usage of Calvo Clause see: Sornarajah, M.: *The Climate of International Arbitration. Journal of International Arbitration,* 2 (1991) 70 –71.

[11] See: Cremades, B. M.: Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues. *Dispute Resolution Journal,* 20 (2004) May–July.

[12] See: Sanders, P.: *Quo vadis arbitration? Sixty Years of Arbitration Practice.* The Hague, 1999. 42.

[13] Many South American countries ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) convened in

The importance of the Panama Treaty (1975) and the MERCOSUR Agreement (1985)–which regards the international commercial arbitration–shall be emphasized. The fact that most South American countries ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) has also great importance.[14]

The purpose of the Inter-American Convention on International Commercial Arbitration (Panama Convention) concluded on 30th January, 1975 was to eliminate the obstacles which hindered the spread of international arbitration. The following conditions in the legislation were regarded as hindrances: (i) the courts refused to enforce those agreements that contained stipulation of arbitration for disputes occurring later; (ii) there were many ways to oppose the arbitral awards, which created an obstacle for enforcement; (iii) foreign persons were prohibited or prevented from acting as arbitrator;[15] (iv) the requirement to include the stipulation of arbitration in a public instrument (i.e. authentic act).[16] It is obvious that these circumstances and requirements made the application of arbitration, moreover the recognition and enforcement of arbitral awards more onerous. These issues were capable of causing funda)–mental harm to the parties.

Among the international agreements we emphasize the importance of the Inter-American Convention Concerning the Extraterritorial Effect of Judge)–ments and Arbitral Awards concluded in Montevideo on 5th May, 1979. The Convention was drafted in English, Portuguese and Spanish.[17]

According to Cremades, the most important obstacle–which was capable of hindering or even making impossible to employ arbitration–was the so-called *cláusula compromisoria* according to that, even if there was a stipula)–tion in the contract, arbitration could only be initiated provided the parties later confirmed this stipulation via *compromiso* (in Portuguese language: *compromisso*); in some cases, the confirmation of the *compromiso* by the court was

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1965, Washington D. C. Many bilateral agreements were also concluded: for instance Argentina concluded 43, Chile 22, Peru 24 bilateral agreements.

[14] The New York Convention was ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Surprisingly, Brazil ratified only on 23rd July, 2002.

[15] For the topic of the present essay it may be regarded as very significant.

[16] See: Bowman, J. P.: *The Panama Convention and Its Implementation Under the Federal Arbitration Act.* www.texasadr.org/panama.cfm.

[17] The text of the Convention: http://www.sice.oas.org/dispute/comarb/intl_conv/caicmoe.asp. The Convention was originally signed by Brazil, Chile, Columbia, Costa Rica, Ecuador, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

also necessary.[18] This rule is very problematic should one of the parties is unwilling to sign the *compromiso* after the emergence of the dispute. The refusal of the *compromiso* (which in many cases contains essential information regarding the appointment of the arbitrator) can create an obstacle to the settlement of the dispute via arbitration. In some countries there is a way to establish the *compromiso* with the intervention of the state court system; if such a solution does not exist, the arbitration cannot be commenced.[19] It should be noted that the origin of the *compromiso* can be traced back to the *compromissum* in Roman law aimed at the appointment of the arbitrator.[20]

The issue related to the *compromiso* caused many controversies even after the conclusion of the Panama Convention. For instance, in Brazil, the Supreme Court of São Paulo ruled in a case between Brazilians and companies from France and other European countries on 16th September 1999 that the stipulation of jurisdiction of the International Chamber of Commerce (ICC) in a contract is valid and enforceable independently of any additional confirmation or agreement, therefore a separate *compromiso* is not a condition of employing arbitration.[21]

Robert Layton in the first half of the 1990's summarized the still existing obstacles which hindered the spread of commercial arbitration in South America. Layton found that the impressions according to which international commercial arbitration was impractical, uncertain, expensive and hard to enforce were still discoverable in the region.[22] It is also notable concerning the present essay that–according to Layton–the stipulation of arbitration was also problematic because a very limited number of people were allowed to be appointed as

[18] See: *Resurgence of the... op. cit.* 57.

[19] With respect to this see : Sanders: *Quo vadis arbitration? op. cit.* 41.

[20] For the Roman law definition of the *compromissum* (which is the agreement of the parties submitting their dispute under the jurisdiction of the appointed judge) in the Hungarian literature see: Földi, A.–Hamza, G.: *A római jog története és institúciói* [History and Institutions of Roman Law]. Budapest, 2008. 13. ed, 544. For a summary of the arbitration in the Roman law, see: Kaser, M.: *Das römische Zivilprozessrecht.* München, 1996. 2. ed. 639–644. For a detailed study on the arbitration in the Roman law, see: Ziegler, K. H.: *Das private Schiedsgericht im antiken römischen Recht.* München, 1971. For a review on this work, see: Schmidlin, B.: Ziegler, K. H.: Das private Schiedsgericht im antiken römischen Recht. *Savigny Zeitschrift Romanistische Abteilung,* 91 (1974) 435–443.

[21] See: *Renault do Brazil SA and others v. Carlos Alberto de Oliveira and others.* Quoted by: Cremades: *Resurgence of the...op. cit.* 62. I am dealing with this case in details later on. Robert Layton emphasizes that certain similarities exist between the *compromiso* and the Terms of Reference of the ICC. Layton, R.: Changing Attitudes Towards Dispute Resolution in Latin America. *Journal of International Arbitration,* 10 (1993) 128.

[22] Layton: Same art. 132–133.

arbitrator due to the legislation. Layton–in order to solve this issue–proposed appointing the arbitrator in the arbitration clause itself.[23] (However, we should mention that this solution is very questionable resulting from the fact that it is possible that the elected persons no longer can act as arbitrators at the time of the occurrence of the dispute.)

The MERCOSUR (South Common Market)[24] Agreement played an important role in the spread of international commercial arbitration in South America. MERCOSUR was founded by the Asuncion Treaty of 1991. Currently it has 5 member states, 5 associated members and one observer state. The MERCOSUR Treaty on International Commercial Arbitration was signed by the foreign ministers of the South Common Market on 23rd July 1998.[25] This agreement was concluded by Argentina, Brazil, Paraguay, Uruguay; ratified later by Chile and Bolivia.

There is a long-run story preceding the conclusion of the MERCOSUR Treaty on International Commercial Arbitration. One of the antecedents is the Montevideo Treaty on international procedural law (1889) that was ratified by Argentina, Bolivia, Paraguay and Uruguay. The Treaty was revised in 1940 by another Treaty signed in Montevideo. Another preceding event was the Pan-American Conference on the minimum requirements of arbitration held in Montevideo in 1933.[26] The Bustamante-code and the Panama Convention (which we already mentioned) are also important in this regard. The two direct antecedents are the bilateral Las Leñas Protocol (1992) regarding judicial co-operation and the Protocol convened by the MERCOSUR member states in Buenos Aires in 1994 on the international jurisdiction in contractual matters.[27]

[23] Layton: Same art. 128.

[24] In Spanish: *Mercado Común del Sur*; in Portuguese: *Mercado Comum do Sul*; in English: *Southern Common Market*. The current members of the Southern Common Market: Argentina, Brazil, Paraguay, Uruguay, Venezuela. Associated members of MERCOSUR: Chile, Bolivia, Peru, Colombia, Ecuador. Observer member is Mexico.

[25] Spanish name of the convention: *Acuerdo sobre Arbitraje Comercial International del MERCOSUR*.

[26] For the character as legal sources of the *Bustamante*-code see especially: Mádl, F.–Vékás, L.: *Nemzetközi magánjog és nemzetközi kapcsolatok joga* [Private International Law and the Law of the International Commercial Relations]. Budapest, 1992. 82–83. About the *Bustamante*-code see: Samtleben, J.: *Internationales Privatrecht in Lateinamerika. Der Codigo Bustamante in Theorie und Praxis. I. Bd.* Tübingen, 1979.

[27] It should be noted that the Arequipa conference played an important role in the unification of civil law in Latin America. The conference was held on 4th–7th August, 1999. Its participants were Argentina, Bolivia, Peru and Puerto Rico. During the conference *Acta de Arequipa* was concluded, the fourth article of which provides that concerning the important areas of civil law shall be harmonized in Latin America. The basis for the

The dispute settlement system of the MERCOSUR Treaty on International Commercial Arbitration is described by László Palotás in the Hungarian literature as follows: "The Mercosur dispute settlement system theoretically lay down the basis for adequate sanctions ruled by *ad hoc* board of arbitration. However, the member states have usually settled their disputes via political negotiations, often on presidential level; therefore not via arbitration. This method provided opportunity to retreat from the provisions of the Treaty, which regarded the effectiveness of the rules of integration as a function of the conformity of the member states."[28] According to Palotás, the MERCOSUR dispute settlement system cannot be analysed disregarding the political factor.

The MERCOSUR Treaty can be regarded as a completely unique institution, because it establishes a regional international arbitration law.[29]

It should be noted that the first MERCOSUR arbitral award of the Arbitration Tribunal was given on 1st April, 1999. In this case, the parties were the Brazilian and Argentine governments; the board of arbitration was composed of an Argentine, a Brazilian and an Uruguayan arbitrator.[30] To sum up, the South American region is not a "hostile" region to international arbitration any longer according to Fernando Mantilla-Serrano.[31]

It has to be highlighted that we can consider as a significant measure of the acceptance of arbitration in Latin America the degree of use of the arbitration in contracts involving governmental entities in the region in a variety of commercial activities. As it is stressed in article of Paul E. Mason and Mauricio Gomm–Sandos, the arbitration including state or a state–owned company has been the subject of a "hot debate" in Brazil, as well. As it has been elaborated by the case law two principles are applied to consider whether a legal dispute

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harmonization is the Roman–German origin of the South- and Central-American legal systems. In detail, see: Hamza, G.: *Az európai magánjog...op. cit.* 293.

[28] See: Palotás, L.: Az *összamerikai szabadkereskedelmi kezdeményezés. PhD-értekezés* [The pan-Americal free-trade initiative. PhD thesis]. http://www.lib.uni-corvinus.hu/phd/palotas_laszlo.pdf. In the quotation the expression fours refers to the founders of the Southern Common Market (Argentina, Brazil, Paraguay és Uruguay). Venezuela joined MERCOSUR in 2006, based on a decision made in Caracas in July, 2006.

[29] See in this respect: Blackaby, N.–Noury, S.: *International Arbitration in Latin America: Overview and Recent Developments.* http://www.iclg.co.uk/index.php?area=4&show_chapter=767&ifocus=1&kh_publications_id=35.

[30] See: Cattaneo, M.: *Recent Developments of Arbitration in Latin America–Focus on Mercosur Countries: Argentina and Brazil.* http://arcnet.org/arclibrary/more.php?id=22_0_1_0_M.

[31] See: Mantilla-Serrano, F.: Major Trends in International Commercial Arbitration in Latin America. *Journal of International Arbitration,* 17 (2000) 139.

of a state or a state–owned company can be arbitrated. First one should analyze the principle of legality under Article 37 of the Brazilian constitution, according to which public assets and rights are always subject to prior legislative authorization. Secondly one has to take into consideration the principle of arbitrability, which provides that the government could agree to arbitrate only with respect the so-called disposable assets (*bens ou direitos disponíveis*).[32]

III.

The legislation of the South American countries regarding arbitration is highly influenced by the process that in several states in the region adopt legislation harmonious to the UNCITRAL Model Law. 33 The purpose of these acts is not only harmonization, but the elimination of the obstacles hindering the adaptation of arbitration.

Another factor is the difference between the levels of the influence by the state courts. Also, several legal systems did not recognize the so-called *Kompetenz-Kompetenz* principle, i.e. the rule that the arbitrators can decide independently their competence.[34] These phenomena can only partly be explained by the influence of the Calvo Doctrine.

Legislators in the region shall face several particularities concerning arbitration, such as the fact that certain international conventions–for example the already mentioned New York Convention–were adopted in completely different times in the South American countries. Also, there is no consensus about the scope of cases that can be decided via arbitration (arbitrability). Another particularity–being closer to the present study–is the distinction between the *arbitraje de derecho* (*arbiter juris* or *arbiter de jure*) and the *amiable compositeur* (arbitrator who judges *ex aequo et bono*). This distinction originates from traditions of continental law. In certain countries the acts regulating arbitration used to separate (and in certain cases they still separate) the *arbiter*

[32] See in that regard the case *Companhia Paranaense de Energia v. UEG Arancaria Ltda.* See: Mason, P. E.–Gomm-Santos, M.: New Keys to Arbitration in Latin-America. *Journal of International Arbitration*, 1 (2008) 34–35.

[33] The UNCITRAL Model Law was compiled in 1985. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. For a brief essay on the Model Law: Horváth–Kálmán: *A nemzetközi eljárások joga... op. cit.* 65–66. For a comprehensive commentary on the Model Law: Binder, P.: *International Commercial Arbitration and Conciliation in Model Law Jurisdictions*. London, 2005. 2. ed.

[34] See: Tawil, G. S.: *Arbitration in Latin America: Current Trends and Recent Developments.* http://www.bomchilgroup.org/argmar04.html.

juris (*arbitraje derecho*) and the *arbiter ex aequo et bono*. The former one had to strictly follow the laws (both in the aspects of substantial and procedural law), while latter was allowed to administer justice more freely, even adopting principles of natural law in his judgement. Also, this distinction can be observed in the appointment and even the challenge of the arbitrator.[35] (However, the *ordre public* shall be respected by the *arbiter ex aequo bono* also.[36]) It should be noted that in several Latin American countries only persons having a law degree can act as an *arbiter de jure*.[37]

These rules–being in force only partially nowadays–highly influence the nature and practice of law on arbitration. In the following, we analyse (in different extent and fullness of details) the law concerning the appointment and challenge of the arbitrator in some Central and South American countries (Argentina, Brazil, Chile, and Mexico).

A) Argentina

Argentina is a federal state therefore composed of provinces. The constitutions allows the provinces–similarly to the constitution of the United States–adopting independent act of procedure. In the present days, on federal level the arbitration is governed by certain provisions of the Code of Federal Civil and Commercial Procedure (*Código Procesal Civil y Comercial de la Nación*) which was promulgated in 1967.[38] The states of the highest importance in Argentina (such as Buenos Aires) adopted independent acts concerning arbitration–however, these acts show high similarity to the federal code.

Surprisingly, arbitration is regarded by the federal code as a special court procedure, not an independent dispute resolution system. It should be also noted that only the amendment which was passed in 1981 allowed appointing foreign

[35] Pieter Sanders in this respect notes that the arbitrator proceeding *ex aequo et bono* is also bound by the public policy (*ordre public*), therefore he also has to respect the laws in force. See: Sanders: *Quo vadis arbitration? op. cit.* 43.

[36] See: Grigera Naón, H. A.: Arbitration in Latin America: Overcoming Traditional Hostility. *Arbitration International*, 5 (1989) 138.

[37] *Inter alia* the law on arbitration of Peru (*Ley General de Arbitraje*) takes up this position.

[38] It may be noted with respect to the name "code of civil procedure" that the Latin American countries (contrary to e.g. Spain) do not follow the mainly German tradition to use the terminology of "orders" (such as *Zivilprozessordnung*) to the procedural laws. In Latin America these acts are also called codes. See: David, R.–Brierley, J. E. C.: *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*. New York, 1978. 102[77].

board of arbitrators in cases having international aspects. Before this amendment this was not possible in the Argentinean law. We can observe many attempts to reform the rules of arbitration. From 1990, codifying the law of arbitration according to the UNCITRAL Model Law was attempted five times. Lately, the draft (*Proyecto de Lex de Arbitraje Comercial Internacional*) was filed in March 2005; however, none of the two chambers accepted it.[39] In the following, we are studying the provisions of the code currently in force which are relevant for our topic. To some extent, we are also indicating certain provisions of the draft law.

The rules currently in force requires–besides a valid stipulation of arbitration–the *compromiso*, duly signed by the parties after the dispute arises as a confirmation of the intention to settle the dispute via arbitration. Art 740 of the federal procedural code defines the necessary elements of the *compromiso* as follows:

- It shall be drafted in writing indicating the date;
- It shall include the name and address of the parties;
- It shall include the names and addresses of the arbitrators;
- It shall include the subject of the arbitral procedure representing the facts;
- It shall mention that the party breaching the compromiso shall pay a fine.

According the Art 741 of the federal procedural code, the optional elements of the *compromiso* are the followings:

- Rules of the procedure; the location where the arbitrators shall proceed and pass the award (if this is not included, the location is the place where the compromiso was signed);[40]
- The timeframe available for the arbitrators to conduct the proceedings;
- A decision about the appointment of a secretary or leaving the appointment to the arbitrators' discretion;
- Stipulate a fine in case a party initiates the nullification of the award–excluding the situation if the parties explicitly declare the appeal off.

[39] See: Blackaby–Noury: *International Arbitration... op. cit.*

[40] It shall be noted that it is essential to differentiate between the location of the procedure and the passing of the award. It can give help for instance in clearing such questions, like when the members of an arbitral tribunal located abroad pass their award in the domicile of the arbitrators and not at the location of the tribunal.

Provided one of the parties will not sign the *compromiso*–in spite of the valid arbitration clause–the other party has to initiate proceedings at the state court to substitute this statement. Therefore, the state courts have extensive rights to interfere in the commencement of the arbitral procedure due to the fact they are to take up a position on a preliminary question of the proceedings, i.e. a question of law. If the state court finds the requests for issuing the *compromiso* grounded, it creates the *compromiso*, so opens the possibility for an arbitral procedure. In case the motion is rejected, the cost of the procedure shall be borne by the party who filed the motion.

The *compromiso*, therefore, also means the agreement on the appointment of the arbitrators. (The fact whether the court or the parties appointed the arbitrator has also serious relevance regarding the challenge of the arbitrators). The agreement on the arbitrators is typically an issue that cannot be agreed on at the time of the stipulation of the arbitration; i.e. the stipulation can be done even years before the emergence of the dispute; therefore it is more than possible that the parties are not able to nominate the arbitrators.

It shall be noted, however, that the practice of the courts shows that the judges have already acknowledged in the 1980's the stipulation of arbitration as being independent, therefore not linked to the *compromiso* and the validity of the contract including the stipulation. This was established by the Argentinean Commercial Supreme Court in a case concerning a stipulation in a contract concluded in Hamburg. The Court denied ruling that there is no opportunity in Argentina to initiate a lawsuit to appoint a board of arbitrators based on a contract concluded in Hamburg.[41]

The Argentinean law concerning the appointment of arbitrators is regarded as very special (however, not unique in South America, but inevitably peculiar). Second paragraph of Art 766 of the Federal Procedural Code provides that in lack of particular provision in the contract in this relation, the arbitrators shall act as *arbiter ex bono et aequo*, therefore proceed on the basis of the principles of natural law. This is why the parties are to stipulate explicitly if they are willing to appoint arbitrators who act as *arbiter de jure* (proceeding based on the statute law). In my opinion, the fact that the parties have to solve this question even in the arbitration agreement, but the arbitrators are appointed only in the *compromiso* is questionable.

In the Argentinean case law, the difference between the *arbiter ex aequo bono* and the *arbiter de jure* is also very significant. The Argentinean Commercial Supreme Court ruled on 4th March, 2005 that the *arbiter de jure* comes to his

[41] See: *Cámara Nacional de Apelaciones en lo Commercial–Sala, 26 September 1988;* http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

decision based on his specialized and legal knowledge, in comparison with the *arbiter ex bono et aequo* who settle the dispute according to the best of his knowledge, even by surpassing the legal formalities.[42] The judgment of the Commercial and Civil Court of Appeal of Formosa is also remarkably in this regard: the court ruled that the award of the board of *arbitri ex bono et aequo* could not be appealed against because they reached their decisions on the basis of natural law, not the positive law.[43]

Contrary to the above-mentioned strict rule, the Procedural Code is more compliant on the rule setting the minimum number of arbitrators. The parties shall agree on the number of arbitrators in the *compromiso*. The parties may agree on all arbitrators together, but they are also allowed appointing one arbitrator each, then the third arbitrator is appointed by the other two arbitrators. Art 750 of the Code is also worth mentioning, according to which the arbitrators–appointed by the parties–vote one from themselves as the president of the arbitral panel. Therefore, the chair is not necessarily the third arbitrator–appointed by the other two arbitrators. This rule is opposite to the rules of certain arbitral organizations.[44] In case the parties cannot agree on the arbitrators, it is the court which appoints them. If a position of an arbitrator becomes vacant, the rules to be followed are the ones which were laid down in the *compromiso*.

According to the Argentinean law, every adult person having full capacity may be appointed as arbitrators. Professional judges and employees of justice can only act as arbitrator in cases where one of the parties is the state.[45]

We can find several distinctions in the Argentinean law concerning the challenge of arbitrators. The most important–which often can be observed in the South American legal systems–is that the arbitrators appointed by the court can be challenged based on the same conditions as professional state judges, whilst the arbitrators appointed by the parties can only be challenged due to facts that arose after their appointment.

In this regard we shall emphasize the observation of Jan Kleinheisterkamp, who points out the problem in the Argentinean law–similarly to other legal systems, for instance the Uruguayan one–that it does not deal with the situation clearly in which the parties do not appoint the arbitrators jointly, but they

[42] See: *C. Nac. Com., sala B, 04/03/2005–armex S. A. v. Application Software.*; http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

[43] See: Telecom Argentina Stet-France Telecom S.A. (10. 03. 2005); http://www.kluwerarbitration.com/ arbitration/arb/country/Argentina.asp.

[44] See: Burghetto, M. B.: Current Status of Arbitration Legislation in Argentina. *Journal of International Arbitration*, 21 (2004) 523[17].

[45] See: Art 765 of the Federal Procedural Code.

each have the right to appoint one arbitrator separately. It does not seem to be reasonable that the other party, who has no right to interfere in the appointment of the arbitrator appointed by his opponent, can only challenge this arbitrator based on grounds arose after the appointment.[46]

As it is already mentioned, if the court appoints the arbitrators, the parties can initiate the challenge of an arbitrator on grounds being similar to the challenge of the professional judges. These are the followings:

- If the arbitrator has family relations with one of the parties or his organizational or legal representative;
- If the arbitrator or one of his relatives have interest in the dispute, provided the arbitrator has identical interest with one of the parties or his organizational or legal representative, excluding the shareholders' position in a public limited company;
- If there is legal dispute between the arbitrator and the party initiating his challenge;
- If the arbitrator is the creditor, the debtor or guarantee against one of the parties, excluding professional banks;
- If the arbitrator against the party, or the party against the arbitrator performed denunciation before the beginning of the arbitral procedure;
- If the arbitrator previously acted as a representative of one of the parties, or provided legal counsel or opinion either before or after the beginning of the procedure;
- If the arbitrator was given significant advantage by one of the parties;
- If a friendly relationship exists between the arbitrator and one of the parties which makes their communication direct and close;
- Apparent hostility showed by the arbitrator against a party, excluding the situation in which there was any kind of assault against the arbitrator following his conduct of the case.

It shall be noticed that these reasons for exclusion include several ones that can also be found in other countries' laws concerning arbitration and the procedural rules of international arbitral organizations.[47]

[46] See: Kleinheisterkamp, J.: *International Commercial Arbitration in Latin America. Regulation and Practice in the MERCOSUR and the Associated Countries.* New York, 2005. 214. It shall be noted that the Brazilian law governs the exclusion of the arbitrator appointed by the other party in a more sophisticated way. This difference is explained in detail later on.

[47] See e.g. Art 7. of the Procedural Rules of the International Chamber of Commerce and Art 5.3 of the Procedural Rules of the London Court of International Arbitration.

In case the arbitrators act as *arbitri ex aequo et bono* (following the explicit order or reserve of the arbitration agreement), initiating challenge of an arbitrator is only possible based on narrower scope of reasons arising after the appointment. For example, if there is a direct or indirect interest in the result of the dispute; or apparent hostility resulting from unidentifiable motive. This rule–which is also existent in the Uruguayan and other South American legal systems–is explained by Kleinheisterkamp with the greater flexibility of *ex aequo et bono* arbitration.[48]

According to Art 747 of the Argentinean Federal Procedural Code, challenge of an arbitrator shall be initiated at the board of arbitrators within 5 days after obtaining knowledge of the appointment of the arbitrator. According to Maria Beatriz Burghetto, this deadline is also applicable if the initiation of the challenge is based on a reason arose after the nomination.[49] If the arbitrator does not renounce, the state court has to decide on the petition. The competent court is the one which has otherwise jurisdiction, or the court where the *compromiso* was concluded. This decision cannot be appealed. However, we shall refer to the interesting fact that the arbitral procedure is suspended until the court rules on the challenge.[50] This can constitute means for obstructing the procedure.

Another rule worth mentioning provides that a judge–therefore an arbitrator also–is allowed denying the participation in the case based on incompatibility without disclosing the reason itself. This rule can be found not only in the Argentinean but also in the Brazilian law. This solution is self-evident for the arbitrator, because he can deny his participation without making the reason public.[51]

According to Art 746 of the Argentinean Procedural Code, the parties can agree on challenging the arbitrator; before this agreement, one of the parties shall file a motion of challenge.

The Argentinean law provides a peculiar solution for modifying the number of the board of arbitrators after the award. Provided the arbitrators cannot reach consensus concerning the award, therefore the decision is obtained via voting, in which the majority makes the decision on the award. If a majority cannot be obtained following the composition of the tribunal, another arbitrator shall be appointed in order to make decision.[52] The number of the board necessarily

[48] See: Kleinheisterkamp: *International Commercial Arbitration... op. cit.* 210.

[49] See: Burghetto: *Current Status of Arbitration... op. cit.* 524[23].

[50] See: Art 747 of the Federal Procedural Code.

[51] See: Art 30.2 of the Argentinean Federal Procedural Code, respectively Art 135 of the Brazilian Code of Civil Procedure.

[52] See: Art 757 of the Argentinean Federal Procedural Code.

varies, so they can obtain majority. It shall be noted here that–on the contrary–according to Art 25 of procedural rules of the ICC (International Chamber of Commerce) Court of Arbitration, the chair has the right to decide in lack of majority.[53]

The draft of the new procedural code contains several novelties being relevant also for this essay. The draft concerns the Argentinean and also the international arbitration (provided the location of the arbitration is in Argentina). The draft–in accordance with the UNCITRAL Model Law–would abolish the dualism of the arbitral agreement and the *compromiso*, using the uniform concept of arbitration clause. In case the parties do not agree on the procedural rules, the arbitrators have the right to choose the most appropriate rules. Another important difference in the draft is that arbitrators can only decide *ex aequo et bono* if the parties explicitly authorize them to do so.[54]

Regarding the appointment of the arbitrators, Art 10 of the draft provides that if the parties do not agree on the number of the arbitrators, one arbitrator is going to proceed. With respect to the exclusion grounds, it should be noted that an arbitrator shall not act in a joint arbitral procedure, excluding the situation if the same tribunal proceed in the other case. Therefore, one may challenge an arbitrator successfully if the given arbitrator proceeds in a case and in a joint case at the same time, and the composition of the two tribunals is different. The legislator is willing to ensure the impartiality of the procedure by this regulation. Joint case is a case in which the petitions and evidences are connected or the outcomes of the two cases are interrelated. However, some issues arise concerning the application of this rule. For instance, if the correlation between the two cases is not obvious, a party can initiate the challenge of the arbitrator–as a tactical means–at any time,[55] almost, stating that he got to know the information just before filing the motion of challenge.

The draft–in accordance with the Model Law–includes the principle of equal treatment of the parties and due process. In accordance with these principles, Art 24 (3) provides that the challenge of the arbitrator can based on the fact that the arbitrator does not forward any communication between him and one of the parties to the other party. The adaptation of a rule laid down in order to prove the impartiality and independence of the arbitrator can create some hindrances.

[53] Concerning the practice of the ICC, see: Schäfer, E.–Verbist, H.–Imhoos, Ch.: *ICC Arbitration in Practice*. The Hague, 2004.

[54] For the summary of the most important changes in the draft, see: Burghetto: *Current Status of Arbitration... op. cit.* 534–535.

[55] See: *Ibid.* 531[66].

In Argentina, one can find several renowned arbitral tribunals. The Stock Exchange Arbitration Court of Buenos Aires (founded in 1963), the Court of Arbitration at the Argentinean Chamber of Commerce and the Corn-Exchange Court of Arbitration (founded in 1905), which decides *ex aequo et bono* shall be referred here. The proceedings of these tribunals are determined by the legal framework of the Federal Procedural Code. The adaptation of the analyzed draft would contribute to the further development of the Argentinean arbitral practice.

B) Brazil

The Portuguese legal system has striking impact on the development of the Brazilian law, especially on the private law.[56] (We should also mention the fact that the German law played also an important role in the development of private law–with especial regard to the civil code.[57]) Arbitration was not unfamiliar to the Brazilian law at all, since Art 160 of the Constitution (known as the "imperial *Magna Carta*") recognized arbitration as a means of settling disputes. The Decree number 737 of 1850 rendered explicitly possible applying arbitration for merchants. It shall be noted that this Decree was abolished by Act 1350 promulgated on 14th September 1866. In spite of the fact that–for instance–in 1910 the dispute between Peru and Brazil on a conflict related to their borders was settled via arbitration (however, not commercial arbitration), until the new law on arbitration (currently in force) was adopted, the legal framework did not fit the needs of arbitration. The arbitration clause was not directly enforceable; the arbitral awards were to be homologated by the state judicial bodies; finally, Brazil ratified certain important international conventions concerning international arbitration relatively late.[58] Despite the fact that the Geneva Convention was signed in 1923 and ratified in 1932, the Panama Convention was ratified only in 1996, while the New York Convention in

[56] See: Hamza, G.: A magánjog kodifikálása Brazíliában [Codification of Civil Law in Brazil]. *Acta Faculatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae*, 29 (1987) 203; Hamza, G.: Törekvések a magánjog újrakodifikálására Brazíliában [Approaches of the Recodification of the Civil Law in Brazil]. *Magyar Jog*, 44 (1997) 756.

[57] See: Valladão, H.: *Der Einfluß des deutschen Rechts auf das brasilianische Zivilgesetzbuch (1857–1922)*. Rio de Janeiro, 1973.

[58] See: Brechbühl, B.: 44th Congress of the International Association of Lawyers (UIA) in Buenos Aires–International Arbitration Commission. *Journal of International Arbitration*, 18 (2001) 239.

2002.[59] Until the Convention on the recognition and enforcement of arbitral awards was ratified by Brazil, the gap resulting from the late ratification led to serious problems for the arbitral practice.[60]

Prior to the act in force governing arbitration was passed, three drafts were presented, in 1981, 1986 and 1988. In 1991, a committee called *Arbiter Operation* was established. The final text of the draft was created in 1992 and the legislature passed the law in 1996. The Act 9307 on arbitration (*Lei de Arbitragem*) was promulgated by the president on 23rd September 1996 and came into force on 24th November, 1996. This act substantially modified the legal framework of arbitration; concerning *inter alia* the enforceability of the arbitral award and the importance of the arbitration clause (that is analysed later in detail).[61] Before the law currently in operation was promulgated, the rules of the arbitral procedure had been included in the Code of Civil Procedure of 1973.

The Brazilian law in force follows to a great extent the provisions of the Model Law–regarding both the domestic and international arbitration. It has, however, preserved certain traditional rules that are very important for the practice. Therefore, the Brazilian law on arbitration can be regarded as a combination of the modern and traditional legislation.[62] For the topic of the present study the questions related to the arbitration clause and the *compromisso* have great importance. Until the present legislation the conclusion of the arbitral agreement, the *compromisso* had striking importance besides the arbitration clause–similarly to several South American legal systems. In case one of the parties was unwilling to agree on the *compromisso*, it was the ordinary state court whose procedure could result in the conclusion of such agreement. It is a fair question, whether the party commencing arbitral procedure who acts *bona fides* may claim damages and costs at the end of the procedure of the state court, when the arbitral agreement is concluded. However, in the Brazilian practice, such claims do not exist.[63]

The act in force regulates also the compulsory elements of the arbitral agreement (*compromisso*), providing that it shall include–*inter alia*–the name,

[59] The Panama Convention was ratified by the Regulation 1902 of 1996, while the New York Convention was ratified by the Regulation 431 of 2002.

[60] Bowman holds a similar opinion. See: Bowman: *The Panama Convention and... op. cit.*

[61] For the importance of the law on arbitration see: Lopes, S.–Sodré, A.: Arbitration Procedures in Brazil. In: Campbell, D.–Rodriguez, S.–Prell, B. (ed.): *International Assistance in Judicial Matters.* Ardsley, N. Y., 1999. 27–28.

[62] See: Kleinheisterkamp: *International Commercial Arbitration... op. cit.* 8.

[63] See: Gomm-Santos, M.: Arbitration in Brazil. *Journal of International Arbitration,* 21 (2004) 496.

profession and domicile of the arbitrators. If the arbitration clause was concluded, however, one of the parties will not agree on the *compromisso*, Art 7 of the act may be applied saying the other party can commence a procedure at the ordinary state court. This court provides an oral hearing and decides on the *compromisso arbitral*. During the oral hearing the court tries to convince the parties to agree jointly on the *compromisso arbitral*. If the parties are unable to agree on the content of the *compromisso arbitral*, it is the court which creates it either at the oral hearing or within 10 days after the hearing.

According to Pieter Sanders this rules means the preservation of the *compromisso*. It constitutes an evidence for the legislative process in which the provisions of the Model Law are adopted in parallel with the traditional rules.[64]

At the present time, however, it is also possible–due to the influence of the practice, to some extent–to commence the arbitral procedure based directly on the arbitration clause. In this case the arbitration clause shall be the so-called complete arbitration clause, including–besides the submission of the parties' dispute under the jurisdiction of an arbitral panel–the precise procedure of the appointment of the arbitrators. This standpoint was explained in the already-mentioned *Renault do Brazil SA and others v. Carlos Alberto de Oliveira Andrade and Others* case. According to the facts of the case, in the arbitration clause the jurisdiction and procedural rules of the International Chamber of Commerce were stipulated in such a manner that the location of the arbitration was the USA. Considering the indicated arbitration clause included the precise rules for appointing the arbitrators, the Court of Appeal of São Paulo ruled that there was no need for concluding *compromisso*. In a subsequent case, a party–based on an arbitration clause not including the appointment of the arbitrators (i.e. not complete arbitration clause)–was unwilling to submit a dispute under the jurisdiction of an arbitral panel, this is why the resolution of the court substituted the *compromisso*.[65]

Therefore, in order to conclude an arbitration clause being capable to completely ignore the jurisdiction of the state courts and to commence the arbitral procedure, the clause shall include the exact procedure of the appointment of the arbitrators. The parties can either stipulate the procedural rules of a certain arbitral body or they may lay down the decisive rules of the appointment. This requirement shows the essential purpose of the legislature: the parties submitting their possible dispute under the jurisdiction of an arbitral

[64] See: Sanders: *Quo vadis arbitration? op. cit.* 49.

[65] See: *Americel S.A. v. Compushopping Informática Ltda. ME and Others*. Quoted by: Gomm-Santos: *Arbitration in Brazil... op. cit.* 52.

panel shall know the entire procedure of establishing the panel, because that will decide the case regarding possibly very large sum in issue.

Concerning the legitimacy of the arbitral procedure, it is essential for the contracting parties to know the procedure of the appointment before the dispute arises; therefore, this cannot constitute basis for ignoring the arbitral procedure. If the parties conclude the above-mentioned complete arbitration clause (no further *compromisso arbitral* is necessary), but one of the parties is not willing to take part in the arbitration, the state court declares the enforceability of the complete arbitration clause and oblige the reluctant party to participate in the arbitration.

Concerning the procedure of the state court it is essential to recognize the difference between this procedure and the one based on Art 7 of the act on arbitration. Latter is applied if a complete arbitration clause does not exist; therefore the conclusion of the *compromisso arbitral* is necessary, however one of the parties will not agree on it. In the case analyzed above the conclusion of the *compromisso arbitral* is not necessary (due to the fact that a complete arbitration clause exists). So, the duty of the court is to declare the enforceability of the complete arbitration clause in case one of the parties will not agree on the arbitral procedure.

According to Art 12 of the law on arbitration, in case the parties conclude the *compromisso*, it expires immediately, if the arbitrator refuses the appointment and the parties explicitly stated previously that they would not call for a substitute person. This applies if the arbitrator dies or certain circumstances occur that prevent him from voting. These conditions shall be taken into consideration when the parties conclude the complete arbitration clause or the *compromisso*.

According the Art 13 of the law on arbitration, every person having full capacity being trusted, therefore appointed by the parties may act as arbitrator. It is worth mentioning that the Brazilian citizenship is not a condition. The law requires that the number of the appointed arbitrators must be odd. If the parties appoint even number of arbitrators, the arbitrators can appoint one further person. Provided the arbitrators are unable to reach an agreement on this issue, the parties may commence the action of the competent state court. However, the law does not define timeframe for the parties to commence a procedure when they realize that the arbitrators cannot agree on the one further arbitrator. This issue shall be solved by the legal practice; however, this provision provides a means for the arbitrators to prolong the procedure. Provided the arbitral panel is not constituted by a sole arbitrator, the arbitrators elect one from themselves as chair of the panel. If the arbitrators are unable to agree on the chair, the law renders help: in this case the most elderly arbitrator will act as the chair.

Art 13 (6) of the Brazilian law on arbitration concerning the impartiality and independence of the arbitrators follows specifically the related provisions of the Model Law. It provides that arbitrators shall act independently, impartially and carefully.[66] Concerning the professional state judges, the grounds of exclusion are divided into two groups: absolute (strict) and less strict grounds of exclusion.[67] This provision regards state judges; however, Art 14 of the law on arbitration provides that a person who is in such relation to the parties or the case itself that–as a state judge–would lead to exclusion shall not proceed as arbitrator. It is necessary to mention that this provision does not show the above-mentioned differentiation between strict and lesser strict grounds of exclusion.

The Brazilian law requires the arbitrators–similarly to the Model Law–to disclose, before they accept the assignment, any fact that would raise justified doubts concerning their impartiality or independence. In order to ensure fair trial, the law further requires equal treatment of the parties (Art 21) and that the arbitrators shall provide oral hearing for both parties.[68]

The Brazilian law is very clear concerning the challenge of the arbitrators, providing that–based on grounds having arisen before the appointment–a party can file motions of challenge only if he had not taken part in the appointment or had obtained knowledge about the certain information after the appointment.[69] These provisions creates a regulation more sophisticated than the Argentinean system, which provides that a party may file motions of challenge against an

[66] The wording of the law on arbitration follows also that of the Model Law using the appropriate Portuguese expressions: „*No desempenho de sua função, o árbitro deverá proceder com imparcialidade, independência, competência, diligência e discrição.*" The Model Law uses the terms "impartiality" and "independence". It shall be noted that Section 2 of Art 21 of the Brazilian law emphasizes the requirement of impartiality, using the term "*imparcialidade*".

[67] The strict grounds are the "*causas de implicancias*", the less strict grounds are the "*causas de recusaciones*" in the Brazilian law. These rules are regulated in Art 134–137 of the Procedural Code.

[68] With respect to this, see: Blackaby, N.: Arbitration and Brazil: A Foreign Perspective. *Arbitration International*, 17 (2001) 137.

[69] Cp. Section 2 of art 14 of the law on arbitration: „*O árbitro somente poderá ser recusado por motivo occorido após sua nomeação. Poderá, entretanto, ser recusado por motivo anterior a sua nomeação, quando: a) não for nomeado, diretamente, pela parte; ou b) o motivo para a recusa do árbitro for conhecido posteriormente á sua nomeação.*" In English: "An arbitrator may be challenged only for reasons which occurred after his appointment. However, he may be challenged for a reason which occurred before his appointment, when: a) he is not appointed directly by a party; or b) the reason for the challenge of the arbitrator becomes known after his appointment."

arbitrator appointed by himself only on grounds arose after the appointment. In this regard, the Argentinean law does not differentiate between the separately and jointly appointed arbitrators; the rule applies to both groups. While this rule is appropriate if the arbitrators are appointed jointly by the parties, in case of separate appointment, it is more questionable. For the party who could not participate in the appointment of the given arbitrator it is not fare to refuse the right to challenge him on grounds arose before the appointment.

The motion of challenge–according to Art 20 of the law on arbitration–shall be filed immediately after the ground for challenge arises. With respect to the decision making, the Brazilian law follows such a "radical" method, which is the stricter solution provided by the Model Law. According to this, the state courts cannot interfere in this case; it is exclusively the arbitral panel that can decide. There is no legal remedy against this decision.

The decision concerning the challenge of the arbitrator may only be challenged in the legal remedy provided against the arbitral award. Within sixty days of the date of service of the award a party may file for an action to have the award overturned–based on certain grounds.[70] The party may invoke the lack of the arbitrators' impartiality or independence; the text, however, does not follow the wording of the Model Law. Art 32 lists the grounds for declaring the award null and void. It includes the case when the award was given by an arbitrator who could not proceed as arbitrator; also, when the award was a result of corruption. The burden of proof–as it can be derived from Art 33–is on the side of the party who filed for an action.

It is clear that the arbitrators have serious responsibility in connection with the challenge of the arbitrators, because this decision highly influences also the award. If the arbitrators are negligent in this respect, it may lead to serious damages of the parties. (It should be noted that Art 17 of the law on arbitration orders the application of the rules governing the responsibility of persons having official positions.) Jan Kleinheisterkamp argues that it would have been a better solution to provide a legal remedy by the state judicial bodies against the decision concerning the challenge of the arbitrators.[71]

It should be also noted that it could take relatively a long time to enforce an arbitral award in Brazil. As a reason for that we can mention that the losing party usually attempts to challenge the award itself in front of a regular court. Nevertheless the regular court in most cases rejects the challenge, it can take significant time before the court in charge reaches such a decision.

[70] Cf.: Lopes–Sodré: *Arbitration Procedures in Brazil...op. cit.* 27–28.

[71] See: Kleinheisterkamp: *International Commercial Arbitration...op. cit.* 217.

As a recent example on the challenge of arbitrator we can refer to the following case. The parties agreed on arbitration in São Paulo under the UNCITRAL rules administered by American Arbitration Association. The parties defined the number of the arbitrators by ruling three arbitrators, each party could appoint one-one arbitrator and the party-appointed arbitrators could select the chairperson of the tribunal. Furthermore the parties composed a submission agreement, in which they expressly waived any challenges to all arbitrators. After two years of procedure the panel issued an award. After the receipt of the award the losing party started judicial proceedings in order to have the award annulled, based on the fact that the arbitrator nominated by the winning party had not disclosed the fact that he had offered legal services to another member of the same company-group several months before the arbitration procedure took place. The losing party argued that it learnt this fact only after the award had been rendered with the help of an Internet research of the arbitrator's law firm. The state court judge in São Paulo nullified the award based on Articles 32, II and VIII, 13, paragraphs 6 and 14 of the Brazilian law on arbitration. It is interesting to note the reasoning of the award, according to which the provisions regarding disqualification of arbitrators and judges cannot be derogated or modified by the agreement of the parties.[72]

The Brazilian law on arbitration combines the traditional rules and the provisions of the Model Law. I illustrated this approach above with some examples. However, the Brazilian law shall face some challenges. The Act 11079 on the Public-Private Partnership was promulgated on 30th December 2004. It allows settling the related disputes via arbitration; however, the location of the procedure shall be in Brazil and its language Portuguese. It is very questionable how the foreign investors will react to such provisions.[73]

C) Chile

The fundamental changes concerning arbitration that occurred in the Latin American countries took place also in Chile. The legal framework, however, is slightly different from the above-mentioned legal systems; we can observe some sort of duality. Chile ratified many international conventions rather earlier. For instance, Chile was one of the first countries which ratified the New York convention (being in force in Chile from 3rd December 1975) and the Panama Convention; moreover, Chile ratified the Washington Convention on settling disputes related to foreign investments. It has been in force since 24th October,

[72] See in detail: Mason–Gomm-Santos: *New Keys to Arbitration... op. cit.* 65.
[73] See especially: Cremades: *Resurgence of the Calvo Doctrine... op. cit.* 63.

1991. Chile concluded a free trade agreement in 1997 with Canada; in 1998 with Mexico and in 2003 with the European Community, South Korea and the United States of America. Moreover, Chile concluded many bilateral agreements on the protection of the investments with a number of European and Asian countries.[74]

Not surprisingly, the state of the economy was also attractive to foreign investors. However, in spite of the ratified international conventions including arbitration as an alternative dispute settlement system, very old rules were governing arbitration in Chile until 2004. The relevant provisions of the Code on Civil Procedure (*Código de Procedimiento Civil*) of 1902 and the law on the judicial organization (*Código Orgánico de Tribunales*) of 1943 had been applied to arbitration. These rules were highly influenced by the Spanish law of the 19th century.[75] Chile attempted several times to modernize the legal framework governing arbitration. The draft of 1992–for example–was rejected based on constitutional grounds. Only in 2004 the Chilean legislature could pass the new law on arbitration.[76]

The draft of the law in force was brought in on 2nd June, 2003. The Congress passed the law on 10th August, 2004, and then it was forwarded to the Constitutional Court for preliminary constitutional control. On 25th August 2004 the Constitutional Court ruled that no constitutional issue was found, therefore the new law was delivered to the President on 10th September 2004. The Act Nr 19.971 on international commercial arbitration (*Ley de Arbitraje Comercial Internacional*) was promulgated on 29th September 2004.[77]

The new law follows the provisions of the UNCITRAL Model Law; therefore it is regarded as the first law governing international arbitration in Chile. The Chilean Juan Eduardo Figueroa Valdes emphasizes the importance of the law as follows:

– The law contributes to create a legal framework in Chile beneficial to foreign investors, therefore it increases the volume of investments;

[74] Concerning these issues see: www.direcon.cl.

[75] With respect to these two laws see: Jorquiera, C.–Helmlinger, K.: *Chile*. In: Blackaby, N. et al. (red.): *International Arbitration in Latin America*. The Hague, 2002. 90.

[76] About the Chilean law on arbitration in the Spanish literature see especially: Paillas, E.: *El Arbitraje Nacional e Internacional Privado*. Santiago, 2003. albónico, E. P.: *Arbitraje Comercial Internacional*. Santiago, 2005.

[77] Regarding the drafting of the new law on arbitration see especially: Conejero Roos, C.: The New Chilean Arbitration Law and the Influence of the Model Law. *Journal of International Arbitration*, 22 (2005) 151–152.

– The law provides rules that are in close compliance with the international arbitral regulations, so it encourages stipulating Chile as the location of the arbitral procedures; therefore it contributes to the improvement of the standard of the Chilean arbitral bodies.[78]

The Chilean legislature follows the monist concept with respect to arbitration, because the law in issue governs only international arbitration. The Chilean domestic arbitral processes are still regulated by the previous rules. This differentiation has great importance for the topic of the present essay. In the following, I am analyzing the provisions of the new law on international arbitration; however, indicating certain rules normative to domestic arbitration.

Concerning the concept of international arbitration the Chilean law follows entirely the UNCITRAL Model Law. Contrary to the previous regulations–which are ordinary in the region–the new law does not require a second agreement for the arbitral procedure. Therefore, in case an arbitration clause exists, no further agreement shall be concluded when the dispute arises; so the duality of the *cláusula compromisoria* and the *compromiso* does no longer exists.[79]

The Chilean law follows the provisions of the Model Law regarding also the appointment of the arbitrators.[80] According to the Chilean law on arbitration, the parties may agree on the number of arbitrators freely. In case they cannot reach an agreement on the number of arbitrators, three arbitrators shall proceed. This rule is compliant to the standard practice of international commercial arbitration.

First paragraph of Art 11 of the Chilean law provides that in absence of different agreement, arbitrators with any nationality can proceed; the law does not contain any prohibitive rules. According to Figueroa Valdes, if advocates may act as *arbiter de jure* only, this would lead to an ostensible contradiction, because the Chilean law on the judicial organization, provides that only Chilean citizens can act as advocates in Chile. That would mean that a foreign advocate could not be *arbiter de jure*. The contradiction is ostensible only, however, because the law on international arbitration explicitly provides that

[78] See: Figueroa Valdes, J. E.: *The New Chilean Law on International Commercial Arbitration* (Law 19. 971). www.camsantiago.com/html/archivos/espanol/articulos.

[79] It should be noted that Art 234 of the law on the judicial organization provides that the parties shall conclude–besides the arbitration clause–an agreement including certain necessary elements. Otherwise, the lack of such agreement hinders the arbitral procedure.

[80] See: Art 10 of the Chilean law on arbitration (*Número de arbitros*–Number of the arbitrators), moreover Art 11 (*Nombramiento de los árbitros*–Appointment of the arbitrators).

anybody can proceed as arbitrator, irrespective of his nationality. This may only be limited by the agreement of the parties. Therefore, foreign advocate can also act as *arbiter de jure* in Chile. A contradictory interpretation of these rules would decrease the autonomy of the parties, which would violate one of the fundamental principles of the law governing international arbitration.[81]

According to the relevant provisions of the Chilean law, the parties may agree on the procedure regulating the appointment of the arbitrators freely. (It shall be noted here that it used to be the *compromiso*, the second agreement concerning the arbitration, which related to the procedure of the appointment.) Provided the parties do not reach an agreement on this issue and three arbitrators proceed, each party may appoint one arbitrator, and the third is appointed by these two arbitrators. The chair of the competent court of appeal shall decide on the appointment, if one of the parties does not appoint an arbitrator within 30 days, or the two arbitrators fail to appoint the third member of the panel within 30 days. Provided the parties agree on a panel constituted by a sole arbitrator, and the parties are unable to appoint the sole arbitrator, on the motion of a party it is the chair of the competent court of appeal which appoints the sole arbitrator. If the parties, or–concerning the appointment of the third arbitrator–the two arbitrators who are already appointed by the parties, or a third person being in charge of the appointment (including arbitral organizations) breach the rules of the appointment, on the motion of a party, it is the chair of the competent court of appeal that decides on the appointment (provided the agreement of the parties does not contain other provisions in this respect).

Section 5 of Art 11 of the law on international arbitration provides that these decisions of the chair of the competent court of appeal are not appealable. During the appointment, the required qualification of the arbitrator and the question of his impartiality and independence shall be taken into consideration. Provided that the third arbitrator or the sole arbitrator is to be appointed via this procedure, the possibility of appointing an arbitrator having different nationality than the arbitrators appointed by the parties shall be considered. This rule is based on the provisions of the UNCITRAL Model Law.

Some remarks should be made regarding the rules indicated above. Cristián Conejero Roos in his essay emphasizes the difference between the concept of the law in force (arbitrators are appointed independently by the parties) and the traditional concept of the law of Chile and other Latin American countries (arbitrators are appointed by the parties jointly).[82] In connection with the

[81] See: Figueroa Valdes: *The New Chilean Law... op. cit.*

[82] See: Roos: *The New Chilean Arbitration Law... op. cit.* 156.

challenge of the arbitrator, however, the Argentinean law does not differentiate between the jointly and independently appointed arbitrators either–as it has been noted above. According to Conejero Roos, emphasizing the concept of the arbitrator appointed by the parties is very important in the Chilean law, because it substantially differs from the earlier concept–being parallel to some extent to the traditions prevailing in the Roman law–of the appointment of the arbitrator.[83] It should also be mentioned here that the new law gives the chair of the court of appeal the right to decide–contrary to the former regulation, which delegated this right to the court of first instance.

In my view it ought to be also emphasized that–provided the parties did not agree on the procedure of the appointment and a panel of three arbitrators proceed–the right for the decision by the chair of the court of appeal opens after the thirty-day-long deadline expires. However, concerning the sole arbitrator, the law does not set such a deadline; it just provides that in case the parties cannot agree on the appointment of the sole arbitrator, on a motion of a party the court of appeal appoints the arbitrator. Taking into account the fact that there is no appeal against the decision, the rule not setting any deadline for the parties to appoint the sole arbitrator may allow misuse of the law. Therefore, the chair of the court of appeal is to be very careful in his decision concerning the appointment of the arbitrator, because this unappealable decision has very great impact on the arbitral procedure.

Traditionally the Chilean law differentiates between the *arbiter de jure* and the *arbiter ex aequo et bono* concerning the challenge of the arbitrators.[84] It provides the same rules to the ordinary state judges and the *arbiter de jure*; while–according to certain judgements–it shall not be applied to the *arbiter ex aequo et bono*.[85]

Compliant to the Model Law the Chilean law on international arbitration orders the arbitrator to disclose and fact that may raise doubts concerning his impartiality or independence. The former law did not include such a provision.

[83] About the *compromissum* in the Roman law see: Ziegler: *Das private Schiedsgericht... op. cit.* 47–77.

[84] It is worth mentioning that the traditional Chilean law did use the concept of a combination of the *arbiter de jure* and the *arbiter ex aequo et bono*. This arbitrator was not bound by the procedural rules laid down in the law; however his award was to be based on the law–contrary to the award of the *arbiter ex aequo et bono*. See especially: Grigera Naón, H. A.: *Arbitration in Latin America... op. cit.* 139.

[85] The consequent application of this interpretation of the two categories of arbitrators would lead to an undesirable differentiation. For this judgement see: CA Santiago (Oct. 17, 1994) 91 II-2 RDJ 95, 96–97 (1994). Quoted in: Kleinheisterkamp: *International Commercial Arbitration... op. cit.* 210.

Art 12 of the new law provides that a party may file a motion of challenge, if such doubts arise concerning the impartiality or independence of the arbitrator. A party who appointed or took part in the appointment of the certain arbitrator may file a motion for challenge based only on grounds that became known after the appointment. Therefore, in case the party appointed an arbitrator and was aware of the fact that a challenge would be grounded against the arbitrator, the right for challenge is regarded as renounced.[86]

The text of the Chilean law follows verbatim the expressions "independence" and "impartiality" of the Model Law using the Spanish words "independencia" and "imparcialidad".

According to the new Chilean law parties are free to agree on the procedure of the challenge of the arbitrators. In case the parties do not stipulate such procedural rules, the law provides subsidiary provisions.[87] According to these subsidiary rules a party is given 15 days following the establishment of the tribunal or obtaining knowledge about the ground for challenge to file a motion of challenge in writing at the panel. If the arbitrator does not renounce or the other party does not accept it (that would cancel the arbitrator's assignment), it is the panel itself that decides on the challenge.

The Chilean law–contrary to the above-mentioned Brazilian rules–provides legal remedy against such decision of the panel. Provided the procedure on the challenge–based on the law on arbitration or the agreement of the parties–does not lead to the desired result, the party who filed the motion of challenge may appeal against the decision. The right for the appeal is conferred on the chair of the court of appeal whose decision can no longer be appealed.[88] In my view, the importance of this appeal is highly decreased by the fact that the arbitral procedure is not suspended by the appeal, therefore even the award can be reached with the participation of the arbitrator in issue.

It should be noted that the procedure of challenge is more complicated if domestic arbitration is concerned.[89] Similarly to the Brazilian law, regarding domestic arbitration strict (*causas de implicancias*) and lesser strict grounds (*causas de recusaciones*) for challenge are differentiated. If one of the *causas de recusaciones* arises, the motion is decided by the state court of first instance–this decision is unappealable. Concerning the *causas de implicancias*, in case there is sole arbitrator, it is the sole arbitrator who decides on the challenge;

[86] Fernandez–Gutiérrez: *Chile*. In: Rowley–Mendelsohn (ed.): *Arbitration World... op. cit.* 55.

[87] See: Art 13 (2) of the Chilean law on arbitration.

[88] See: Art 13 (3) of the Chilean law on arbitration.

[89] The relevant provisions are Art 115–116 of the Chilean Code on civil procedure.

however, his decision can be appealed at the regional court. Provided the panel consists of more arbitrators, the decision is made by the tribunal excluding the arbitrator in issue. This decision is unappealable. It is worth mentioning that the arbitral procedure is not suspended, just before the award is made; however, the arbitrator in issue cannot proceed until the decision on the challenge.[90]

It can be observed that the Chilean law is much more complicated concerning the domestic arbitration than the new rules on international arbitration. The new law on arbitration regulates the appointment and challenge of the arbitrators in such way that may create a framework for arbitration meeting the requirements of the parties participating and willing to participate. According to Figureoa Valdes an important step of this process was the serious limitation of the role of the state courts concerning international arbitration.[91]

With respect to the possibility of appeal concerning the composition of the arbitral tribunal, we should refer to paragraph four of Art 34 (2) a) of the Chilean law on arbitration. It provides that the competent court of appeal may declare the award null and void, provided the party filing the motion manage to prove that the composition of the panel (or the procedure) was not in compliance with the agreement of the parties, excluding the situation when this agreement breaches one of the cogent provisions of the law. Provided the parties did not conclude an agreement on the procedural rules, the invalidation of the award may be initiated if the composition of the panel (or the procedure) breaches the provisions of the Chilean law on arbitration. It shall be emphasized that invalidation may also be initiated–besides the above-mentioned cases–if the composition of the panel (or the procedure) breaches the law on arbitration as such.

One of the most important arbitral organizations is the Court of Arbitration at the Santiago Chamber of Commerce. The Santiago Arbitration and Mediation Center was founded in 1992.[92] This Court of Arbitration has its own rules of procedure, which offers to the parties to call upon the Chamber of Commerce to appoint the arbitrators. Challenge of the arbitrators appointed by the Chamber of Commerce is also possible. Parties have six days from the appointment to file a motion of challenge. The motion is judged by the Council of the Chamber. Provided both parties agree on the challenge of an arbitrator, the exclusion

[90] For a summary see: Kleinheisterkamp: *International Commercial Arbitration... op. cit.* 210.

[91] "*At the same time, the unquestionable restriction in judicial intervention of Ordinary Tribunals ensures the well functioning of the international arbitral system in Chile.*" See: Figueroa Valdes: *The New Chilean Law... op. cit.*

[92] http://www.camsantiago.com/en/index.htm.

takes places automatically, without the substantial examination of the motion. If one of the parties does not agree, the Council makes the decision after holding an oral hearing. This decision of the Council is unappealable.[93] In my view, the rules of procedure of the Court of Arbitration at the Chilean Chamber of Commerce essentially respect the autonomy of the parties.

The Arbitration and Mediation Center of the Chilean-American Chamber of Commerce plays also an important role in Chile. The rules of procedure of this arbitral organization contain also important rules on the challenge of the arbitrators. Art 11 provides that parties may file motions of challenge if they obtain knowledge about concerns related to the impartiality or independency of an arbitrator. The deadline for this motion is 15 days from the appointment of the arbitrator.[94]

D) Mexico

Similarly to many Latin American countries, the Calvo Doctrine also played an important role in the development of the Mexican commercial arbitration.[95] Not surprisingly, serious changes of the system of the 19–20th centuries took place in the 1990's. One of the essential reasons of this phenomenon is–similarly to many other Latin American countries–the ratification of different international conventions. Mexico ratified the New York Convention in 1971 and it also became a member of the Panama Convention. In 1986 Mexico joined the Montevideo Convention. As it is already mentioned, Mexico is an observer state of the MERCOSUR. The importance of the free-trade agreements concluded by Mexico in the development of the Mexican law on arbitration shall also be noted. Special emphasis shall be laid on The North American Free Trade Agreement (NAFTA), whose members include Mexico. The Agreement provides that an investor of a member may initiate arbitral procedure directly against a member state. (Mexico has this rule in several other free-trade agreements also.)[96]

[93] For all these rules see Art 8–10 of the rules of procedure: http://www.camsantiago.com/html/english/index.htm.

[94] See in this regard: http://www.amchamchile.cl/node/1456;http://www.amchamchile.cl/node/1108.

[95] For a good summery on the Mexican arbitration law in Spanish see: Uribarri Carpintero, G.: *El arbitraje en México.* Mexico City, 1999.

[96] Wobeser, C. V.: Mexico. In: Rowley, J. W.–Mendelsohn, Mc. B. (ed.): *Arbitration World. Jurisdictional Comparisons.* London, 2006. 2. edition. 206.

The US-Mexico Conflict Resolution Center plays very important role in the development of the arbitration practise in Mexico. This non-profit organization was founded in 1994 at the State University of New Mexico. The organization was founded in order to contribute to the development compliant with the international trends of the Mexican-American arbitration practise.[97]

The fundamental rules on arbitration are included in the code of commerce (*Código de Comercio*). The code was amended by a regulation promulgated on 4th January, 1989 with a new Chapter four of the Fifth Book regulating arbitration.[98] In spite of the fact that these rules already followed the provisions of the UNCITRAL Model Law, they were substantially amended in 1993. The regulation promulgated on 22nd July 1993 provided rules on arbitration being much more flexible to the parties. A novelty being important for the topic of the present essay provides that the parties are free to choose the language of the procedure different from Spanish; also the location of the arbitration and they are also free to define the number of the arbitrators.[99]

The Mexican law differentiate between the arbitrators proceeding based on statute law, the *arbiter de jure (derecho)* and the arbitrators deciding on the basis of fairness, the *arbiter ex aequo et bono (de conciencia)*.[100] The provisions concerning the appointment and challenge of the arbitrators are included in Art 1426–1431 of the Mexican *Código de Comercio*. According to these rules, the parties are free to choose the number of the arbitrators. If such an agreement does not exist, a sole arbitrator proceeds. The legal practise requires that the number of the arbitrators shall be odd (*número non*), in order to create a functioning panel.[101] The law does not provide any limitation regarding the nationality of the arbitrators. The parties are free to define the procedure of appointment. Provided the parties are unable or unwilling to agree on this issue, the law provides subsidiary rules. The sole arbitrator is appointed by the judge of the state court if the parties cannot agree on his appointment. If the panel consists of three arbitrators, each party appoints one arbitrator, and the

[97] See: www.nmda.nmsu.edu.

[98] See in this regard: Hoagland, A. C.: Modification of Mexican Arbitration Law. *Journal of International Arbitration*, 7 (1990) 91–100.

[99] See: ITA NEWS & NOTES "Mexican Commercial Code Amendments Further Liberalize Arbitration Law". http://faculty.smu.edu./pwinship/arb-17.htm. About the amendment of 1993 see further: Drafting and Enforcement of International Arbitration Clauses in Mexico and the United States. See: www.mexicolaw.com/LawInfo01.htm. This article includes samples of the recognized clauses.

[100] About this differentiation see especially: Penner, V.: Development of Arbitration. In: *Arizona Civil Remedies Seminar* (October, 1999.). www.cidra.org/articles/newway.htm.

[101] See: Penner: *Quoted art. op. cit.*

third (the chair) is appointed by these two arbitrators. Provided a party does not appoint an arbitrator within 30 days after the call for doing so, or the two arbitrators–appointed by the parties–are unable to appoint the third arbitrator within 30 days, it is the state court that is going to appoint the chair of the panel on a motion of a party. If the parties reached an agreement on the procedure of the appointment; however, one of the parties, or the already appointed arbitrators, or a third person–including institutions–did not complete his duties, the court may interfere in the procedure according to the purpose of the procedural order.

In spite of the fact that one of the aims of the amendment of the Mexican law on arbitration was the diminution of the role played by the state courts,[102] we should refer to the fact that there is no appeal against the above-mentioned decisions of the judge of the state court. According to the law, the judge–when appointing an arbitrator–has to take into consideration the necessary qualification of the arbitrator and any other circumstances that are capable of assuring the impartiality and independence of the arbitrator. Despite the fact that the law explicitly provides that anybody–irrespective of his nationality–may be appointed as arbitrator,[103] in case a state judge decides on the appointment, he shall appoint an arbitrator having different nationality from the parties. While the aim of the previous rule is to provide freedom to the parties concerning nationality of the arbitrators, the purpose of the latter is to provide that the arbitrator having dominant position is impartial and independent

It can be observed in the above-mentioned rules that the Mexican law does not require any specific qualification for the arbitrators; however, the certain person has to be of full age and have full capacity. We should mention here that in some other Latin American countries the legislature explicitly includes specific requirements for becoming arbitrator in the law concerning the appointment of the arbitrator. For instance, second paragraph of Art 480 of the Uruguayan Code of civil procedure in force (*Ley N. 15982 Codigo Gerenal del Proceso*) provides explicitly that arbitrators shall be over 25 and have full capacity.[104]

Certain international conventions–also ratified by Mexico–may provide further requirements concerning the qualification of the arbitrators. The North

[102] See: *ITA NEWS & NOTES „Mexican Commercial Code... op. cit.*

[103] See: Art 1427 of the Codigo de Comercio.

[104] See: *Ley N. 15982 Codigo General del Proceso*, Art. 480 (*Arbitros*): „*2. Puede ser árbitro toda persona mayor de veinticinco años de edad, que se halle en el pleno goce de sus derechos civiles.*" These requirements (age 25, full civil capacity) are explicitly included in the part concerning the appointment of the arbitrators.

American Free Trade Agreement–for instance–requires that the arbitrator proceeding in disputes between an investor and a member state has to be familiar to international law and investment affairs.[105]

Concerning the impartiality and independence of the arbitrator, the Mexican code strictly follows the relevant provisions of the UNCITRAL Model Law;[106] it provides that the arbitrator has to disclose any information before the appointment that may raise concerns regarding his impartiality or independence. After the appointment, the arbitrator still has to disclose any such information, until the end of the procedure–if the parties did not obtain knowledge of the given fact. If the party appointed an arbitrator or took part in the appointment, he may file a motion of challenge against this arbitrator based only on grounds he noticed after the appointment.

The challenge may only be initiated in the existence of facts raising grounded doubts concerning the impartiality or independence of the arbitrator; or, provided the arbitrator does not have qualifications having been required by the parties. The interpretation of this rule–which follows the provisions of the Model Law–leads to an interesting question: what is the procedure to be followed if a qualification is required by an international convention but the parties did not include such rule in their agreement. However, we will not find explicit answer in the law; presumably challenge may be initiated based on the above-mentioned provisions.

Similarly to the appointment of the arbitrator, the parties are free to define the procedure of the challenge of the arbitrators. In case such an agreement does not exist, the party initiating the challenge shall file a motion of challenge in writing at the panel within 15 days after he obtained knowledge on the composition of the panel or the ground for challenge. If the arbitrator does not renounce or the other party does not accept it, it is the panel itself that decides on the challenge. The party filing the motion may appeal against this decision at the court within 30 days. The court makes an unappealable decision on this issue. The arbitral procedure is not suspended by the procedure of the court; the arbitrator in issue may also participate; moreover, even the award may be given. This provision follows the Model Law; however, the latter is substantially

[105] See: Wobeser: *Mexico... op. cit.* 209–210.

[106] For the relevant parts of the commentary on the UNCITRAL Model Law see: Binder: *International Commercial Arbitration... op. cit.* 116–117.

different concerning the fact that in the Model Law, it is not only the court that may decide on the appeal.[107]

Art 1457 of the Mexican law regulates the nullification of the award. We should emphasize the rule which provides that such procedure may also be initiated on grounds that the composition of the panel (or the procedure) did not comply with the agreement of the parties; excluding the situation when this agreement breached one of the cogent provisions of the law. Provided the parties did not conclude an agreement on the procedural rules, the invalidation of the award may be initiated if the composition of the panel (or the procedure) breaches one of the rules of Art 1457.[108] We should refer here to the judgement of the 25th Civil Court of the Federal District on 12th June, 2001.[109] The plaintiff initiated the nullification of an award of the ICC Court of Arbitrator, based on–*inter alia*–certain concerns regarding the impartiality of the arbitrator. The Mexican court dismissed the case. It reasoned that the ICC had already dismissed the motion of challenge filed during the arbitral procedure, and the plaintiff did not appeal this decision at the state court, in spite of the fact that such option was granted by Art 1429 of the Mexican Code of Commerce (following the Model Law).[110]

IV.

I presented certain essential features of the law concerning arbitration of the Latin American states, with special emphasis on the appointment and challenge of the arbitrators. It can be observed that–until the recent past–many factors

[107] See: Binder: *International Commercial Arbitration... op. cit.* 124. The evident purpose of the above-mentioned distinctions is to ensure the applicability of the Model Law in different legal families.

[108] We should emphasize the difference between the solution for legal remedy and the concept of *amparo*. The *amparo* is a constitutional appeal that may be filed at the federal court against a judgement of a state court in a nullification or enforcement procedure, if the judgement breaches a personal right protected by the constitution. See: Wobeser: *Mexico. op. cit.* 217.

[109] The judgement is: http://www.kluwerarbitration.com/ arbitration/arb/country/ Mexico.asp.

[110] Art 1429 of the Mexican Code on commerce–following the Model Law–provides that the party filing the motion of challenge are given 30 days after receiving the refusal of his motion to appeal at the state court. The decision of the court shall not be appealed. The arbitral procedure is not suspended by the procedure of the court; the arbitrator in issue may also participate; moreover, even the award may be given.

(including political ones) contributed to the regulation and practise of commercial arbitration. (I did analyze in details the Calvo Doctrine in this regard.) The striking influence of the UNCITRAL Model Law of 1985 is obvious in the recent legislation of the states of the region.

The new laws and drafts based on the UNCITRAL Model Law faced (and still face) different challenges due to–besides the above-mentioned political factors–the legal traditions. One of these challenges is the still existent differentiation between the domestic and international arbitration. The duality of the arbitration clause and the arbitration agreement (the *clausula compromisoria* and the *compromiso arbitral*) and the efforts to put an end to this duality in order to facilitate the arbitral procedure are also important. The principle according to which arbitrators are appointed jointly and not independently by the parties has also traditional basis. The rules governing the appointment and challenge of the arbitrators are determined by the dichotomy of the *arbiter de jure* and the *arbiter ex aequo et bono*. The efforts of the legislatures to unify the law on arbitration have to face these phenomena also. The fact that rules concerning the appointment and challenge of the arbitrators, moreover the possible legal remedies are still different to some extent in the region (i.e. in the countries examined in the present essay) shows that the process of creating a uniform system for arbitration has not reached an end yet.

In conclusion, it can be established that the efforts to unify the law on arbitration–that have already materialized in the laws, the legal practice and the completed drafts–substantially contributed to create a more coherent legal framework concerning international arbitration. Due to this process, international commercial arbitration, as an alternative dispute settlement system became popular among domestic and foreign investors in the region.[111]

[111] It is interesting to mention that the spread of the arbitration in the Latin American region also resulted in the formation of an informal, but well-known "Arbitration Bar", including lawyers and law firms from the region and also from Europe and the United States. In Brazil the activity of the Brazilian Arbitration Committee ("CBAr") should be mentioned, which has its own journal dealing with arbitration (*Revista Brasileira de Arbitragem*). See in detail: Mason–Gomm-Santos: *New Keys to Arbitration... op. cit.* 63.

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KRISTÓF SZÉCSÉNYI-NAGY *

New Functions of Hungarian Civil Law Notaries

Abstract. In Hungary the codification of the civil law is just now progressing; the National Assembly is currently debating the Proposition for the new Civil Code replacing the Code of 1959. The Bill also affects the Hungarian notariat, which proudly looks back to a past of 700 years, and is conferring several new powers on the organisation.

In the medieval Hungary the activities requiring public authenticity were performed by two types of institutions, the locus authenticus operated by the Church and the secular civil law notary. The loci authentici were succeeded by the Latin type of notariat in 1875. Following the 1948 Communist takeover, the Latin type of notariat fell victim to the transformation of the justice system after the Soviet model. It was not until after 1991 that the private type of notariat in harmony with the Hungarian traditions could resume its operation in the end.

At present two main groups of cases fall within the competence of the civil law notaries: conducting certain non-litigious proceedings, and preparing notarial deeds. The new Civil Code would refer several new non-litigious proceedings to the competence of the civil law notaries, for example keeping the register of the matrimonial and conjugal property contracts, conducting divorce upon the agreed request of the parties, as well as the dissolution of common law marriage upon the agreed request of the parties. In conclusion the codification enlarges the sphere of tasks of the notariat in the territory of non-litigious proceedings, thus wishing to strengthen the Hungarian Notariat's official character.

Keywords: civil law notary, notary public, civil law codification, Civil Code, civil procedure law, register, payment order, non-litigious proceeding, deed

Introduction

The idea of the codification of private law in Hungary was first raised at the time of the 1848 Revolution. After the suppression of the war of independence (1849), however, there was no opportunity for carrying out such a large-scale legislative work for a long time. The first comprehensive Draft-Code was completed in 1900, but the Motion for the Act on the Code of Private Law (hereinafter: ACPL) was tabled to the National Assembly only after World

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War I, in 1928, which mostly adopted the solutions of the German, the Austrian, and partly, the Swiss Codes. Although, the standard of ACPL was highly reputed, it was not adopted for political reasons.

It is interesting to note that it took place right in the darkest era of communist dictatorship (between 1953 and 1959) that the codification of Hungarian private law was resumed and successfully completed: effective until this day, Act 4 of 1959 on the Civil Code (hereinafter: CC) relying on ACPL and according to the limitations set by the socialist economic system aspired to comply with professional expectations to the greatest possible extent. By reason of taking account of the changes in the economic structure, CC was amended several times in the years of socialism; among these the most remarkable one was the Amendment of 1977. Following the 1990 change of regime and the transition to market-economy, the enactment of a new Code became imperative.

In 1998, the Hungarian Government passed a resolution about the urgent need of a comprehensive reform of civil law and to that effect, it established the High Committee for the Codification of Civil Law and the Redaction Committee for the Codification of Civil Law. The first one was primarily constituted by state leaders and heads of professional bodies, while the other consisted of scholars and practising lawyers, i.e., experts. Professor Lajos *Vékás* was invited to be the President of the High Committee. The Draft-Bill for debate was prepared in 2006 by the Redaction Committee, however, it was taken over in 2007 for further legislative work by the Ministry of Justice and Law Enforcement. The National Assembly of the Republic of Hungary is debating the Draft Bill reviewed and completed by the Ministry right now.[1]

The proposal for the new Civil Code provides an all-embracing regulation for the entire scope of private law except for company law, thus, the legislation process is of outstanding importance for all fields of law, including the functions of civil law notaries. Hungarian notaries, the functions of which proudly date back to a past of several centuries may acquire several new competences due to the new Code, which may substantially transform its present functions. We wish to provide an outline of the history of Hungarian notaryship as well as of the impact of current civil law codification on the functions of notaries in the following.

[1] Vékás L. (ed.): *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (Expert proposal to the Draft of the New Civil Code). Budapest, 2008. 53–57.

I. Historical Overview

1. The Hungarian notaryship celebrated the 700th anniversary of its establishment in the previous year. Namely, when Charles Robert, or Carobert of Anjou-Naples (reigned between 1308–1342), was elected to be the King of Hungary on 27th November, 1308, two civil law notaries, Johannes de Pontecurvo and Guilelmus de Sanguitneto were delegated to Hungary under the escort of Cardinal Gentilis, the Papal Legate, authorized with their powers by the Pope and the Emperor in order to prepare an attesting notarial document (attestation)[2] about the fact of the King's election. And unlike foreign civil law notaries, who had operated until then only with a temporary character in the country, they settled down in Hungary and practised their profession with a permanent character later on.

In medieval Hungary, peculiar parallelism had emerged in respect of the activities related to public authenticity. It was as early as in the last third part of the 12th century that the so-called locus authenticus et credibilis (hereinafter: authentic places) had appeared, which had discharged a kind of notarial, investigational and legal activity in the modern sense of the word, mainly within the structure of the ecclesiastical organs (chapters, convents). Authentic places were established owing to a need for legal certainty, for putting private law transactions into writing, and taking into consideration the fact that in the Kingdom of Hungary only the ecclesiastical organs were in possession of the infrastructure, culture and influence necessary to perform this kind of activity, these powers were transferred into the jurisdiction of the church. If we take the Western-European development into account, the role of notaries in respect of the activities related to public authenticity had not been exclusive in our country. The system of authentic places, unparalleled in Europe, consisted of about 80 such bodies in Hungary in their prime time, i.e., in the 15th century. It is important to point out, however, that the usability of the deeds prepared by authentic places was limited: interestingly enough, they did not have probative force just before the ecclesiastical courts, only the worldly courts accepted

[2] The instrument was published in Latin: Codex diplomaticus Hungariae ecclesiasticus ac civilis I–XI. Cura et studio Georgii Fejér. Budae, 1829–1844. VIII/1. 264–269. (selection) and the instruments originating from the legation of Cardinal Gentilis in Hungary (1307–1311). Hungarian Instruments Record in the Vatican I. 2. Budapest, 1885. 155–199. The instrument is published in Hungarian: Kristó Gy.–Makk F. (eds.): *Károly Róbert emlékezete* (In Memoriam to Charles Robert). Budapest, 1988. 79–82. as well as in: Rokolya G. (ed.): *700 éves a közjegyzőség Magyarországon* (Notaryship Celebrates its 700th Anniversary in Hungary). Budapest, 2008.

them.[3] In the country torn into three parts after the Battle of Mohács (1526), and particularly in the territory under the occupation of the Ottoman Empire, the conditions for the operation of authentic places became much worse. The authentic places underwent a unique way of development in the Principality of Transylvania (the eastern part of the former Kingdom of Hungary, relatively independent between 1541 and 1690), which was under the influence of Reformation: even if individual solutions were rather random, it can be stated in general that the secularisation of the Transylvanian authentic places was implemented.[4] In the 18th century–thanks also to the regulation of the relations of land properties–authentic places played an important role for a short time subsequently, since they were exclusively entitled to issue official copies of the documents made or stored by them, and these official copies had a prominent function in the territories recaptured at the end of the 17th century in the restoration or the earlier relations of land properties. In the 18th century, it could be noticed in the whole country that the role of authentic places was slowly, but surely taken over by the County Assemblies and Free Royal City Councils, i.e., by the organs of public administration – implying that their time was over.[5]

In connection with the activities related to public authenticity in the Middle Ages, the civil law notary played another crucial role in Hungary. The institution of notaryship originates in the *tabellio* familiar in Roman law, which revived in Lombardy after the period of the Great Migration: it spread in Italy, in the Southern French territories, which applied the written law, and in Dalmatia, which belonged to Hungary after 1105. The institution was introduced into German legal territories, as well, but in the north of the Alps, notarial documents could only be used before ecclesiastical courts. The first civil law notaries, who operated with the authorisation of the Pope and the Emperor, appeared in Hungary in the 13th century, typically under the escort of some papal legate, but upon the completion of their mission, they immediately left the country along with the Legate. The civil law notaries delegated to Hungary together with Cardinal Gentilis in 1307, however, operated for quite a long time in the country, and with their appearance, the operation of civil law notaries became

[3] Kőfalvi T.: A hiteleshelyek mint a magyarországi közjegyzőség előzményei (Locus Authenticus as the Predecessor of Hungarian Notaryship). In: *700 éves a közjegyzőség Magyarországon. op. cit.* 12–25.

[4] Bogdándi Zs.: Az erdélyi hiteleshelyek a szekularizációt követően (Locus Authenticus in Transylvania following the Secularisation). In: *700 éves a közjegyzőség Magyarországon. op. cit.* 41–53.

[5] Homoki-Nagy M.: Megjegyzések a magyar királyi közjegyzőség történetéhez. In: *700 éves a közjegyzőség Magyarországon. op. cit.* 74–86.

permanent in the Kingdom of Hungary. It is important to underline that the competence of civil law notaries departed from that of the authentic places. While the documents of the authentic places could mainly be used before the secular courts, notarial documents carried a probative force before the ecclesiastical courts under the Decree of 1405 issued by King Sigismund. Therefore, notarial documents were issued first of all for the attestation of legal transactions relating to matrimony, community property, inheritance and ecclesiastical property.[6] The institution of civil law notaryship, however, did not prove so enduring, as the network of the authentic places. Following the bane of Mohács (1526), civil law notaries disappeared from the country without leaving a trace.

2. The function of the civil law notary reappeared again after the suppression of the 1848/1849 war of independence in the country. The force of the Austrian Civil Code (ABGB) was extended to Hungary according to the written order of the Emperor dated November 29, 1852, and also by means of a written order issued in 1858, Austrian notarial regulations were introduced in Hungary, as well. The Hungarian National Judicial Commission of 1861 reluctantly abolished these modern legal rules, which were introduced definitely by force, but the days of authentic places were already numbered.[7] Following the Compromise between Austria and Hungary (1867), eventually, Article 35 of 1874 introduced the Latin type of notaryship as a result of a long-lasting preparation, the quintessence of which is that a private person vested with official powers proceeded, who was entitled with the competence of editing deeds. In lieu of the French model, which confers general competence upon civil law notaries in non-litigious proceedings (*iurisdictio voluntaria* in Latin), the legislator followed the more moderate German pattern, which referred some special non-litigious proceedings and the preparation of documents to the competence of civil law notaries, without the application of documentary force. It was in 1875 that the organisation of royal notaryship was established and the scope of authority of civil law notaries was extended with a new type of action, i.e., the probate proceeding. This marked the first step of the process, according to which the non-litigious proceedings of the courts were transferred to notarial powers.

The Latin type of notaryship became a stable part of the domestic legal system and of the institutional system of the civil law procedure in a quarter of a century and it could operate in a suitable framework until the end of World War II.

[6] Csukovits E.: Közjegyzők a középkori Magyarországon. In: *700 éves a közjegyzőség Magyarországon. op. cit.* 54–73.

[7] Tóth Á.: A magyar közjegyzőség gyökerei dióhéjban (The Roots of Hungarian Notaryship in a Nutshell). *Közjegyzők Közlönye* (The Gazette of Notaries), 12 (2008) 3.

3. After the communist takeover (1948), the Latin type of notaryship fell victim to the transformation of the justice system according to the Soviet pattern. The state clerk notary replaced the private civil law notary in 1949, several prominent civil law notaries were discharged from the profession for political reasons and the notarial community was forced into the organisation of local courts. The state clerk notary could boast with much less prestige than its Latin type predecessor, which is attributable not only to the then negligibly small public prestige of the profession, but also to the fact, that in the business world of the socialist regime there was much less demand for deeds (notarial documents) than in the civil era. Following a forced intermission of 40 years, the institutional system of the Latin or private type of civil law notaryship corresponding to Hungarian legal traditions was again reinstated in 1991.

II. The Situation of Hungarian Notaries in our Days

1. Act 41 of 1991 On Civil Law Notaries (hereinafter: ACLN) reinstated the Latin type of notaryship. Accordingly, civil law notaries appointed by the Minister of Justice shall be organised in a chamber-system under the law. The legislator justified this provision in the Preamble to the Act as follows: "As the State and the society are equally interested in the proper operation of the self-employed notarial institution and in the adequate exercise of public powers conferred upon notaryship by law, civil law notaries shall be organised into a chamber structure according to the Proposal, and the Chambers shall discharge the tasks related to inner administration, scilicet, the supervision of the performance of state duties shall be ensured by mandatory membership. That is the reason why the civil law notary shall not yet be entitled to practise the profession, before gaining chamber membership, because chamber membership shall be established upon the appointment of the Minister of Justice. The continuous and ongoing performance of the official administration of justice assigned to civil law notaries and the interest of the citizens necessitates the restriction of the number of notarial positions, which justifies the fixed character of their seats and territorial jurisdiction."[8] The organisation of Hungarian civil law notaries based upon the above consists of five regional chambers,[9] i.e., the

[8] The Preamble of the Minister to Act 41 of 1991 on Civil Law Notaries. *Complex DVD Jogtár*.

[9] See, Section 39 of *Act on Civil Law Notaries*.

"There are 5 territorial chambers operating in the territory of the Republic of Hungary:

Hungarian National Chamber of Civil Law Notaries is constituted by regional chambers. These chambers qualify as public bodies under Section 65 (2) of Act 4 of 1959 on the Civil Code (CC), but their primary task shall be the exercise of the rights of the notarial self-government.

A civil law notary may perform his/her activity individually (as a private entrepreneur) or as a notarial office. The provisions of Act 4 of 2006 on Business Associations concerning limited liability companies shall be applicable to the establishment, inventory, operation, control, termination and members' responsibilities of notaries' offices.[10] Civil law notary candidates and substitute civil law notaries shall replace the outgoing members of the body of civil law notaries. The civil law notary shall employ the civil law notary candidate and the substitute civil law notary. Upon the instruction and according to the responsibility of the civil law notary, the substitute civil law notary may settle notarial matters on his own, with the exception of attestations, the notarial deeds made out by the substitute civil law notary shall not be valid and he shall not issue official or duplicate copies without the counter-signature of the civil law notary.[11]

By virtue of Section 12 of ACLN, the jurisdiction of civil law notaries is usually the same as the area of jurisdiction of the local court that operates at the seat of the civil law notary, however, taking into consideration the peculiar situation of the capital, the jurisdiction of civil law notaries operating in Budapest shall encompass the territory of the capital. Nevertheless, as the provision sets forth: "the jurisdiction of civil law notaries in the seat of which there is no court operating shall be defined by a decree of the Minister of Justice", which refers to the exception from the court organisational system.[12] At present, 313 civil law notaries operate in Hungary, which is almost the triple of the number

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a) the Budapest Chamber of Notaries Public: operating in the jurisdiction of the Budapest Municipal Court, Komárom-Esztergom, Nógrád and Pest County Courts,

b) the Győr Chamber of Notaries Public: operating in the jurisdiction of Győr-Moson-Sopron, Vas, Veszprém and Zala County Courts,

c) the Miskolc Chamber of Notaries Public: operating in the jurisdiction of Borsod-Abaúj-Zemplén, Hajdú-Bihar, Heves and Szabolcs-Szatmár-Bereg County Courts,

d) the Pécs Chamber of Notaries Public: operating in the jurisdiction of Baranya, Fejér, Somogy and Tolna County Courts,

e) the Szeged Chamber of Notaries Public: operating in the jurisdiction of Bács-Kiskun, Békés, Csongrád and Jász-Nagykun-Szolnok County Courts".

[10] See, Section 31/A (3) of *Act on Civil Law Notaries*.

[11] Sections 25 and 29 of *Act on Civil Law Notaries*.

[12] IM Decree 15/1991. (XI. 26.) Minister of Justice, on the Number and Seats of Notarial Positions.

of local courts. In most settlements with a seat of a civil law notary, more than one civil law notaries work, therefore, in general it can be stated that the access to notarial services is easier than to courts.

The fees of civil law notaries–taking into account the official activities performed by them–is regulated by decree and they are divided into two elements: a fee and a cost-refund.[13] Contrary to the public belief, notarial fees are much lower than lawyers' (uncontrolled price) fees, in addition to that, notarial fees have not risen for more than a decade (for instance: their basic hourly payment is fixed at HUF 1500 (EUR 5)–against the hourly wages of HUF 10.000–20.000 of lawyers (which is considered an average amount in their circles).

Right after the reinstatement of the Latin type notaryship in 1992, Hungarian notaryship joined as a member the U.I.N.L., scilicet, The International Union of Notaries, which is the framework of Latin type notaries' offices, then, following the accession of Hungary to the European Union, Hungary became a member of the C.N.U.E., i.e., the Council of Notaries' Offices of the European Union.

2. Further to the competence of civil law notaries, Section 1 of ACLN is of crucial significance. The Section declares with a principal force the following:

"(1) The act confers public authenticity upon civil law notaries, so that they shall provide impartial legal services to the parties, in order to avoid legal disputes.

(2) The civil law notary shall prepare public documents (deeds) about contracts and facts of legal significance, keep legal documents, accept money, valuables and securities at the order of the parties in order to transfer them to the obligee, shall help the parties with the exercise of their rights and the fulfilment of their obligations upon instruction, while assuring equal opportunities for all parties.

(3) The civil law notary shall conduct probate action and other non-litigious proceedings assigned to its powers.

(4) Acting within his powers defined by law, the civil law notary shall perform official administration of justice as a part of the justice system of the state."

"By virtue of the respective Decisions of the Constitutional Court and the Supreme Court, [...] the civil law notary shall belong to the justice system of the state under public law, it may act solely within its powers as defined by law. The whole scope of its activity is regarded exclusively as official activity. Performed in the name of the state, under the authorisation arising from public law, the official notarial service aims to avoid legal disputes on the one hand,

[13] IM Decree 14/1991. (XI. 26.) Minister of Justice, on the Fees of Notaries.

and to facilitate due process on the other hand. The two means ordered to reach these above-mentioned goals are the preparation of public documents (deeds) and the conduct of other non-litigious proceedings assigned to notarial powers."[14]

a) The notarial non-litigious proceedings, the number of the cases of which was 125,000 in 2007, ended much earlier than court proceedings. In 2007, 79 p.c. of the cases were completed within three months, a further 14 p.c. within 6 months, while the proportion of the matters lasting longer than one year represented 1 p.c.[15] This statistics is enviable also for the courts dealing with similar type of non-litigious proceedings. The scope of non-litigious proceedings of civil law notaries consists of the following groups of cases:

– *Proceeding in Probate Actions*,[16] which is the longest-standing non-litigious proceeding in notarial competence. Its speciality is that the major part of the cases is instituted ex officio, if the testator had an inland real estate.

– *Conduct of Proceedings on the Destruction (since 2009 Annulment) of Securities and Documents* instituted at request with the purpose to deprive lost securities (documents) of their legal effects.[17]

– *Maintaining the National Register of Wills*, which has been in operation for a longer period of time, but its application has only been mandatory since 2007 in respect of last wills and testaments made out as notarial deeds and other legal statements containing orders for the case of death and private wills deposited at civil law notaries. The goal of the register is to ensure that the testator's last will or testament shall be enforced, even if the inheritors have adverse interests and it is to be feared that the last will or testament might be concealed. Therefore, Section 135 (4) of ACLN provides that the civil law notary proceeding in a probate action shall be obliged to consult the National Register of Wills with the purpose to enquire about the potential existence of the last will and testament of the testator.

– Since 1997, for the creation of an equitable mortgage on movable assets, the mortgage contract should be documented in front of a civil law notary and mortgage should be registered in the *National Register of Mortgages*. The

[14] Anka T.: A közjegyzői nemperes eljárások (Notarial Non-Litigious Proceedings). *Közjegyzők Közlönye*, 12 (2008) 3.

[15] Preamble of the Minister to Act 45 of 2008 on Certain Notarial of Non-Contentious Proceedings, in *Complex DVD Jogtár*.

[16] IM Decree no. 6/1958. (VII. 4.) Minister of Justice on Probate Actions.

[17] Sections 40–45 of the MT Decree no. 105/1952. (XII. 28.) of the Council of Ministers on the Provisions Necessary to the Enactment of Act 3 of 1952 on the Code of the Civil Procedure as of January 1, 2009, Sections 28–36 of Act 45 of 2008 on Certain Administrative Non-Contentious Proceedings.

priority objective of this Register is to attest the existence of the mortgage with public authenticity.[18]

– As of 2009, the scope of the duties of notaries shall be extended with two new powers, on the one hand with *preliminary evidence*, which was already subject to notarial competence before 1992 [*see*, Sections 207–211 of Act 3 of 1952 on the Code of the Civil Procedure (hereinafter:CCP)], on the other hand, with the non-litigious proceeding directed to order *expert evidence (*which was an effective type of court proceeding since 2005). Act 45 of 2008 on Certain Notarial Non-Litigious Proceedings (hereinafter: ACNNP) assigned both proceedings to notarial powers with the purpose of the avoidance of later action or its expedition, if possible. In the previous proceeding, a record of evidence qualifying as a public instrument shall be issued, whereas, in the latter case an expert opinion shall be issued, which may be used in a court proceeding.

– It is important to point out here that recently it has been raised to introduce and to assign to the competence of civil law notaries the so-called *register of general authorisations or powers of attorney (both in case of concluding contracts/transactions and proceeding in law-suits)* as well as *the procedure for the order of payment* regulated under Chapter 19 of CCP from the extremely overloaded courts.

In general it may be concluded as regards these proceedings that they cover the exercise of typical official powers of administration of justice described under AB Decision no. 1/2008 of the Constitutional Court as the so-called "non-contradictory type of the administration of justice", which are subject to strict jurisdictional rules.

b) The other important part of notarial functions dating back to almost a thousand years' history is the drafting of instruments. Notarial deeds may be divided into two categories:

– *Instruments for legal transactions* shall attest with public authenticity the fact that the party expressed his will to conclude legal transactions (for instance: contract, agreement, last will or testament). The preparation of the instruments of legal transactions may be interpreted as instrument-drafting.

– *As to instruments for attestations,* the civil law notary shall certify with public authenticity the facts of legal significance in the form of records or clauses, for instance: that the copy is identical with the document presented to him, the translation is correct, the signature and the initials are genuine, but shall also certify the date of the presentation of a document, the communication of a statement or notification, consultation and resolution, other facts of legal significance, the

[18] Section 262 of Civil Code.

protest against non-payment of promissory notes, cheques and other securities, the contents of public authenticity records.[19]

The common feature of notarial deeds is that both types qualify as public documents and the presumption of authenticity is attached to them under Section 195 of CCP, that is, as public documents, they shall fully prove as notarial documents the measure or decision in it, together with the authenticity of the data and facts certified by the documents, making declarations contained by the documents in line with their times and manners. The presumption of authenticity also means that the person whose name is indicated in that form in the instrument shall be considered as the issuer of the document, until the contrary is proved. The reversal of the burden of proof might be of decisive significance in an action. In addition to the fact that private documents never prove the authenticity of the facts included in them, the great difference between public and private documents is that while the presumption of authenticity is attached to public documents, it is exclusively the presumption of genuineness that is attached to private documents, i.e., the text preceding the signature shall be considered unchanged and not forged. Thus, even in case of a private document with full probative force, the party proving with the instrument must prove that the instrument derives from the person indicated as the issuer of the instrument, if this is disputed by the opposing party or the court raises doubts as to its authenticity.[20]

It follows from the probative force of public documents and the public trust surrounding them that notarised documents are deemed immediately enforceable,[21] therefore, in case of the non-performance of an obligation included in a notarised document, protracted litigation shall be avoidable.

What is important to mention as regards the differences between the regulation of instrument-drafting and non-litigious proceedings is that concerning instrument-drafting, ACLN does not specify grounds for jurisdiction, thus, the parties can take benefit of the services of any civil law notary. This almost creates a competition situation among civil law notaries with one major point of departure, that the fees are relatively fixed.

c) In addition to the above-mentioned two main case-groups, civil law notaries are also vested with other authorities, which are specifically connected with the confidential nature of the notarial service. Accordingly, the civil law notary shall be entitled to taking any instrument, data-medium into custody, and money, valuables and securities in public circulation into entrusted custody

[19] Chapter 9 of *Act on Civil Law Notaries*.
[20] See, Section 197 of the Code of the Civil Procedure.
[21] See, Section 21 of Act 53 on Judicial Enforcement.

from a party.[22] Since 2009, this group of cases has been extended with a new service: at the request of the party, the civil law notary shall deposit the notarised copy of the document included in the request in electronic custody.[23] The aim of the procedure is to ensure that the notarised copy of the party's important document could be stored in an electronic form, in case the original document is contingently destroyed.

3. Following the accession of Hungary to the EU in 2004, however, several problems arose in respect of the competences, the organisational rules and the fees of civil law notaries.

Namely, the instrument-drafting process could just as well operate on the basis of free market principles and formally it does not differ from the document-drafting activity of lawyers–at first sight. But–as I have already mentioned above–the instrument prepared by the civil law notary is a public document, and as such, it is immediately enforceable, which implies a great advantage against the private documents. After the accession of Hungary to the EU, the European Commission (Directorate General for Competition) formed his informal opinion concerning instrument-drafting, precisely that as regards the number of positions and the fees of civil law notaries, the free-market principles should be confirmed and he also considered to institute an action at the European Court for this reason. The grounds of this deliberation are to be found primarily in the Anglo-Saxon (not Latin type) way of thinking. In common-law countries, the Latin type of notaryship (i.e., the civil law notary) is not familiar, since in Anglo-Saxon states the notary public mostly discharges certifying activities and does not prepare instruments. It is worth mentioning as a point of interest that among continental countries, only the Netherlands abolished the system of fixed fees and of fixed number and seat positions, which resulted in catastrophic results: the price of notarial services soared up in the country and the territorial position fulfilment rate badly declined, because civil law notaries moved to large cities in the hope of a better life there. Since that time, the Netherlands has taken serious efforts to reinstate the system of fixed fees and of position number and seats.

In regard of EU-related matters, we have to underline the so-called citizenship action, which was instituted by the Commission versus several Member States (Austria, Germany, Luxembourg, Belgium, France), because the law of these states prohibits persons holding foreign citizenship to discharge notarial functions in the respective countries. Since this proceeding had started before 2004, and considering that Hungarian law also prohibits foreign citizens to pursue notarial activity in the country, Hungary is also involved in the case as

[22] Sections 158–165 of *Act on Civil Law Notaries*.
[23] Section 171/A of *Act on Civil Law Notaries*.

an intervening party not simply as a party. In the citizenship action, the argument of the Member States is based on the fact that the civil law notaries discharge public duties.

III. The Transformation of the Role of Notaryship in the Future

The role of Hungarian notaryship–also by reason of EU-related legal problems described above–is undergoing transformation at the moment, as well. The notarial functions mainly based upon document-drafting activities until now will be replaced by notarial functions based upon powers embracing non-litigious procedures of clearly official character. This trend has already been heralded by ACNP described earlier, but even more peculiar instances are the proposal concerning the new Civil Code (hereinafter: Draft CC) and the draft-law on the Enactment of the new CC (hereinafter: DECC), which would transfer new powers into the competence of civil law notaries.

The Draft CC would entrust civil law notaries with the responsibility of maintaining some further new registers. Thus, under Version 'A' of Section 3:65 of the Draft CC: "the Hungarian National Chamber of Civil Law Notaries shall keep the Register of Community Property Contracts. The Hungarian National Chamber of Civil Law Notaries shall provide information at the request of the parties on whether the contract of a married couple is included in the register. Concerning the contents of the contract, information cannot be furnished, unless upon the presentation of the written authorisation of either of the spouses or for authorities, so that they can fulfil their tasks as defined by the law."[24] Although, the draft-law submitted to Parliament does not mention notaryship as such in most of the places and refers the assignment of the tasks related to the maintenance of registers to the purview of separate laws, it becomes clear from the preamble to the Draft CC that according to the intent of Government, the responsibility to keep the new registers proposed under the Draft CC shall be assigned to the Hungarian National Chamber of Civil Law Notaries.[25] Accordingly, the civil law notary shall keep the register of common-law spouses' common property contracts,[26] in addition to the register of marital

[24] The text of the Draft Civil Code submitted to Parliament for official administrative discussion (IRM/PJKNMFO/2007/356.) by the Ministry of Justice and Law Enforcement on 29th October, 2007.

[25] See, 407 of the Preamble to Civil Code.

[26] Section 3:66 applicable under Section 3:89 (1) c) of the Draft Civil Code.

community property contracts, the register of the so-called preliminary legal statements,[27] and moreover, the records of general authorisations,[28] as well.

The responsibility to keep these registers is by all means connected with the notarial function of public authenticity and enhances the role of the notaryship as part of the public power. With regard to the authentic registers, the marital and common-law spouses' community property contracts are of a declarative type,[29] whereas, the register of preliminary legal statements and the records of general authorisations are of constitutive force, thus, the entitlements entered into the register are established upon the entry.

Furthermore, the Draft CC directed at the out-of-court, peaceful settlement of legal disputes in order to relieve the overloaded courts shall establish a new non-litigious procedure, scilicet, the termination of the matrimony or conjugal community relationship (of registered common-law spouses) by the civil law notary. By virtue of Sections 3:21 (1) and 3:25 of the Draft CC, the civil law notary shall dissolve the marriage, and taking into consideration Section 3:89, the conjugal community relationship upon the agreed request of the parties, if requested by the spouses (registered common-law spouses) jointly and without influence, if the spouses (registered common-law spouses) do not have a common minor child, or a child entitled to maintenance, or, if the spouses (registered common-law spouses) agreed in the alimony according to law burdening them against one another, in the use of the common apartment with the exception of the termination of the joint property on the real estate. The issue of the distribution of the joint properties shall be laid down in a notarial document or in a private document counter-signed by a lawyer. At the same time, the dissolution of matrimony or of conjugal community shall not be

[27] According to Section 2:16 of the Draft Civil Code: "a major person may make a preliminary legal statement–even if restricted or deprived of his disposing capacity in the future in the event of a possible reduction of his mental ability–in the interest of the settlement of his property relations and certain personal relationships. The precondition of the validity of the preliminary legal statement is to have it recorded in accordance with the provisions of separate law." Based on the previously said, the preliminary legal statement may be regarded as a last will or testament for case of life.

[28] By virtue of Section 5:59 of the Draft Civil Code: "the right of representation may be granted (general authorisation) in the scope of certain cases not defined in advance for a definite or indefinite period of time. General authorisation becomes valid only, if it is laid down in a private document of full probative force or in a public document. General authorisation shall be established upon recording it in the electronic registry kept as specified under a separate act on general authorisations."–It is to be noted that general authorisation may be valid or invalid right before it is established.

[29] Section 3:66 (2) of the Draft Civil Code.

possible, if the disposing capacity of either of the spouses (registered common-law spouses) is limited in respect of making legal statements concerning his/her financial situation, or, if the invalidity or non-existence of matrimony or conjugal community must be declared.

Conclusions

In a nutshell, the Draft CC enlarges the scope of the authority of Hungarian notaries and at the same time, it would clearly transfer it closer to the activities of public power, ensuring on the one hand the job-security of the notarial community, on the other hand, that the notaryship as to its functions and organisational structure will not be challenged by the law of the EU.


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BOOK REVIEW

Nótári Tamás: **A salzburgi historiográfia kezdetei** (The Beginnings of Historiography in Salzburg). Szegedi Középkortörténeti Könyvtár 23. Szeged, Szegedi Középkorász Műhely, 2007. 342 pp.

Tamás Nótári's diverse erudition is now proved again after several occasions by the work that processes the historiography of early medieval Salzburg, presents and explains the Latin sources of the period. The results of the philological analysis of the sources processed provide useful additional information not only for legal historians on the law of Salzburg in the 8th–9th c.; readers interested in politics and ecclesiastical history will also find in it public history background information important to them, which has not been published in Hungarian so far. This review will primarily focus on the key results of the work in terms of legal history; deliberations on philological subjects will be touched upon only to the extent that they bear major significance in legal history.

The monograph is arranged around Libellus Virgilii, Gesta Sancti Hrodberti confessoris, Liber confraternitatum, Notitia Arnonis, Breves Notitiae, the so-called Carmina Salisburgenia and Conversio Bagoariorum et Carantanorum, that is, the seven, or six–as Libellus Virgilii has been left to us as part of Breves Notitiae–most important sources from Salzburg in the 8th and 9th c., following the chronology of the woks listed.

On the one hand, the historiography of Salzburg–interpreting this term in an extended form Nótári ranks hagiography, having value of historic source and itself presenting historical facts, estate registers and carmina here–is outstandingly rich compared to Bavarian source materials of the period since, albeit, hagiographic works, estate registers and letters were produced also in Freising, Regensburg and Passau, yet, it is only Salzburg that can be proud of Conversio Bagoariorum et Carantanorum, this peculiar Salzburg genus mixtum so much typical of Salzburg.[1] On the other hand, after the dethronement of the last duke of the Agilolfing dynasty, Tasilo III by Charlemagne and the winding up of the independent Bavarian Dukedom, Regensburg was lo longer to be the duke's seat, and the Bishopric of Salzburg having been raised to the state of arch-

[1] Lhotsky, A.: *Quellenkunde zur mittelalterlichen Geschichte Österreichs.* Graz–Köln, 1963. 155.

bishopric in 798 had undoubtedly attained primacy by the late 8th c. over the rest of the Bavarian ecclesiastical centres. That is, by then it become de iure the centre of power in Bavaria–so, the emphatic analysis of these sources is justified by the historical/political importance of their place of origin. Furthermore, the late 9th c. sources of Salzburg enrich us with information of unique importance on the history of the Carpathian Basin, the Avars.

The title "The beginnings of the historiography of Salzburg" is explained by the author as follows. Most of the sources that constitute the subject of the analysis were written not primarily with historiographic aim: they constitute records of dispute on estates in the a protocol form, cosmography, legend written under pseudo names with a periodic overtone, list of names, estate and donation catalogues that united Christianity in the community of prayer, poems meant to serve as epitaphs, accompanying letters, or practicing style, the bill of indictment or legitimating material of lawsuits to defend the (alleged or real) jurisdiction of the diocese. All of them contain the historiographic element, but their objective is often, in addition to (or by) recording events taken place, is practical, legitimating-oriented, pragmatic: to determine, record the place, role, significance of Salzburg that had turned from a modest locus the intellectual, secular and ecclesiastical centre of Bavaria in the flow of politics having calmed into history.

The present Salzburg became the centre of provincial Norica, the new unit of the Roman Empire under the name Iuvavum during the reign of emperor Claudius (41–54), and it was during the ruling of Antoninus Pius that it saw its fully blooming period of its dynamic development. Already at this point, the author raises the issue of the continuity of the town and Christianity existing here; he emphasises the circumstance that no written sources have been left to us on the period between the evacuation of Noricum ripense in 488 and the arrival of Rupert at the end of the 7th c. The author highlights Rupert, because his person is of key importance in the history of Salzburg, and the chapter about Gesta (Vita) Hrodberti confessoris,[2] which treats the Rupert legend, is involved in the volume.

In the analysis of the sources–primarily in the examination of Gesta sancti Hrodberti confessoris and two notitiae–Nótári finds out what explains the changing of the name of the town from Iuvavum to Salzburg. The Bavarians took under their control the salt exploitation in the vicinity of the town, Reichenhall, which, commenced in the times before Roman epoch though,

[2] See also Nótári, T.: Gesta Hrodberti. In: Classica–Mediaevalia–Neolatina. Ed. L. Havas et E. Tegyey. Debrecen, 2006. 131. sqq.; On Bishop Virgil's Litigations in Bavaria. *Acta Juridica Hungarica*, 48 (2007) 49. sqq.

terminated in the 2nd c. (The simultaneously existing names of Reichenhall in Latin and German: Salinae and Halla, which were supplemented by the name of the river running nearby: Salzach and resulted in the change of name.) Salt exploitation was recommenced in the early 8th c. but salt wells (putea) were already very deep; it was possible to lift salt only with proper scooping instruments, and this required a huge volume of wood, which were floated down the river Salzach next to Salzburg to the salt wells, and to the lead pans suitable for boiling salt. Referring to the archaeological sources, and the simultaneous use of the Latin and German terminology examined by him, the author draws the conclusion that as early as in the period of the Agilolfingers Salzburg had an industrial type of salt exploitation and in this economic development the monasterium sancti Hrodberi had an outstanding part.[3] Before characterising the years Rupert spent in Salzburg, Nótári makes a detour to tell that it was after extended diplomatic negotiations that Rupert left his bishop's seat, Worms and went to Bavaria at the invitation of Duke Theodo. One of the most interesting sections of the work is from which readers learn of the reasons for his leaving Worms: he belonged to the kinship of the Merowing dynasty and the "opposition nobility" of the Carolingians. The wife of Theodo of Agilolfing origin was a Merowing princess; so, being herself an ardent enemy of the Carolingians she found that bishop Rupert was a political ally. Rupert reorganised the Christian community, and in 798 Salzburg became an archbishopric, which was not received with uniform appreciation among Bavarian bishops; so, there was an increased need for legitimising the primacy of Salzburg by Rupert. He founded churches and monks' communities (e.g., cella Maximiliani and the nuns' cloister in Nonnberg); yet, before his death he left for Worms where he died at an uncertain time, in 715, as Nótári dates the event.

Notitia Arnonis is the record of Arn, bishop of Salzburg, which contains the list of the estates and donations obtained earlier by the bishop's diocese from the years approx. between 788 and 790. This "assets inventory" was made in order for the new ruler, Charlemagne ascending the throne to confirm the donations. Without having knowledge of the political situations evolving in the background the bishop's records would be "up in the air". The author, however, fills this gap; the chapter depicts a new and exciting historical conflict: the reader can learn of the dramatic conflict between the last ruler of the Bavarian Dukedom, Tasilo III and the Frankish king: Nótári provides an insight into the details of the show trial and dethronement of the duke in 788 in Ingelheim. And how is bishop Arn related thereto? In the political isolation of Tasilo by

[3] Cf. Nótári T.: Salzburg neve a kora középkori forrásokban (The Name of Salzburg in Early Medieval Sources). *Collega*, 2005/1. 48. sqq.

Charlemagne, in addition to the Bavarian "opposition nobility", bishop of Arn played an outstanding part too. The antipathy against Tasilo was aroused by the fact that the oath of allegiance made by Tasilo, who had been "released" from the guardianship to his uncle, Pippin, formed the basis of "a personal relation of dependence rather than a relation manifested on the level of public law, but was far from being a vassal's relation", and he was not willing to keep to his oath of allegiance even after having made hostages, including his own son, to Charlemagne. The Bavarian secular and ecclesiastical dignitaries also cast it in Tasilo's eyes that following his wife's advice, who in order to take revenge for her father's dethronement urged her husband to turn against the Franks, entered into alliance with the Avars, who were located outside the ius gentium boundaries of the Christians of the time, and, therefore, Tasilo was also considered one who turned against the Christian world. All this did not amount to sufficient accusation for dethronement: he was accused of having committed harisliz too; which meant arbitrarily leaving the royal army, and the Bavarians claimed that Tasilo fled from the combat against Aquitania in 757; referring to his illness he returned to Bavaria from the theatre of war.[4]

The author asserts that it is beyond doubt that the displacement of the Agilolfing dynasty was not legally well-founded. He also examines, however, to what extent the judgment passed on Tasilo can be considered lawful, and how the accusations against him can be grouped and qualified. It raises doubt regarding the lawfulness of the dethronement of the dynasty, points out Nótári, that Charlemagne was forced, years after the decision was passed, to have Tasilo taken out from the monastery and have him resign from dukedom in 794 at the council in Frankfurt in the name of himself and all of his descendants.[5] Consequently, it was not in the theatre of war but through the instrument of iurisdictio that Charlemagne obtained power over Bavarian land; it was on the occasion of seizing power that the bishopric had to make "an inventory of donations" and have it approved by the king. That is how the record of the bishop of Arn is connected with both the ecclesiastical and public history of Salzburg, which record contains the donations granted by dukes, noblemen and

[4] Krawinkel, H.: Untersuchungen zum fränkischen Benefizialrecht. *Forschungen zum deutschen Recht*, II/2. Weimar, 1937. 47. sqq.

[5] See Nótári T.: III. Tasziló trónfosztása – adalékok egy koraközépkori koncepciós perhez (Tassilo III's dethronement–remarks on an early-middle-age show trial). *Jogtudományi Közlöny*, 2005/12. 503. sqq.; Tassilo III's dethronement – remarks on an early-middle-age show trial. Publicationes Universitatis Miskolciensis. *Sectio Iuridica et Politica*, 23 (2005) 65. sqq.; Infidelitas and Harisliz–On the Dethronement of Tasilo III. *Jogelméleti Szemle*, 2008/1.

other persons in chronological and geographical order. This source is significant not only in terms of legal history, since it provides an enumeration of land register nature on the conditions of estates of the period, it is unique also in linguistic terms: from among the texts examined by the author "this is the text that bears the signs of grammatical and stylistic deterioration before the period of the Carolingians."[6]

Breves Notitiae are also connected with Arn, and also contain the enumeration of the estates ad donations obtained; albeit, they come from a later period, the years between 798 and 800. The enumeration was produced due to the fact that the Bishopric of Salzburg was raised to the state of archbishopric in 798; Pope Leo III granted pallium to Arn, thereby making him the leader of the new archbishopric. In Breves Notitiae (Brief records) the author does not confine himself to making the estate register public; he gives a profound description of the events that had preceded the process of the town becoming an archbishopric. Salzburg was raised to the state of archbishopric in the years after Tasilo's dethronement, at Charlemagne's request. Nótári provides an overview of the key points of the relations between bishop of Arn, Charlemagne and the papacy; and their political/historical significance in the process of Salzburg being raised to the state of archbishopric. From among these events the presentation of the following are especially exciting, and explored in-depth by the author: the assassination against Pope Leo III in 799; the precedents, circumstances and consequences of the meeting between the people and the king in Paderborn. Referring to the fact that Charlemagne did not take any firm action against the opponents of the Pope, the author makes it probable that the king was in some form involved in the assassination.

Contrary to Peter Classen's opinion[7]–who claims that after the assassination the Pope and the king spent several months together–Nótári deems it is expedient to deliberate, and supports it with Einhard's records, that Leo III must have stayed only for a few days in Paderborn, but–the author makes it probable–that during this time they negotiated on the establishment of the empire, then, accompanied by bishop Arn, the Pope continued his journey to Rome. Arn was still in Rome (as a member of the entourage of Charlemagne)

[6] Cf. Nótári, T.: Remarks on the 8th Century Registers of Salzburg. Novy Sad Faculty of Law. *Collected Papers* 2008/3. 401. sqq.; Jogtörténeti adalékok a VIII. századi salzburgi (birtok)jegyzékekhez (Legal and Historical Remarks on the Registers of Salzburg from 8th Century). *Állam- és Jogtudomány*, 49. 2008/1. 99. sqq.; Personal status and social structure in early medieval Bavaria. *Acta Juridica Hungarica*, 50. 2009/1. 85. sqq.

[7] Classen, P.: Karl der Große, das Papsttum und Byzanz. Die Begründung des karolingischen Kaisertums. Sigmaringen, 1985. 42. sqq.

when in December 800 Leo III was forced to take a ceremonial cleansing oath. The author points out that Arn enjoyed the trust of Charlemagne much more than the rest of the Bavarian bishops, which was even more reinforced by Arn assuming commitment in the events preceding his crowing emperor in 800.[8] As the Bavarian bishoprics subjected to Salzburg did not agree with Arn having become archbishop and Salzburg having been made archbishopric, Salzburg attempted to support the disputed primacy; as part of that they relied on the Rupert tradition and the estate register at that time no longer supplemented merely by duke's donations. It is in this point Nótári sees the key difference between *Breves Notitiae* and *Notitia Arnonis. Breves Notatiae*, however, differ from the record by Arn referred to in the previous chapter not only in this respect: *Breves Notitiae* is not merely a list of donations but a peculiar *"genus mixtum"*, namely, the enumeration contains narrative, historical passages too, and so becomes similar to *Vita Hrodberti* and *Epistola Theotmari*.[9]

Conversio Bagoariorum et Carantoanorum (The conversion of the Bavarians and the Carantanians) written in 870 might have been sent by Adalwin, archbishop of Salzburg to Louis the German.[10] As a precedent to the written pleading, the author mentions the missionary activity performed by Constantine (Cyrill) and Methodius considered the apostles of the Slavs on the territory of Moravia and Pannonia in the 860's; the judgment passed on Methodius at the Council of Regensburg held in 870 by archbishop Adalwin and his bishops. As the archbishop and his diocesan bishops felt that the missionary activity carried out by Methodius on the territory of Pannonia injured the jurisdiction

[8] See also Wavra, B.: *Salzburg und Hamburg. Erzbistumsgründung und Missionspolitik in karolingischer Zeit.* Berlin, 1991; Abel, S.–Simson, B.: *Jahrbücher des fränkischen Reiches unter Karl dem Großen I–II.* Berlin, 1883. II. 163. sqq.; Nótári T.: III. Leó pere és az Salzburgi Érsekség megalapítása (Trial of Pope Leo III and the Foundation of the Archbishopric of Salzburg). *Collega*, 2005/4. 55. sqq.

[9] Lošek, F.: Notitia Arnonis und Breves Notitiae. In: *Quellen zur Salzburger Frühgeschichte.* Veröffentlichungen des Instituts für Österreichische Geschichtsforschung 44, Mitteilungen der Gesellschaft für Salzburger Landeskunde, Ergänzungsband 22. Hrsg. v. Wolfram, H. Wien–München, 2006; Nótári T.: Két forrás a kora középkori Salzburgból, Notitia Arnonis – Epistola Theotmari (Two Sources from Early Medieval Sources: Notitia Arnonis – Epistola Theotmari). *Aetas*, 2004/2. 72. sqq.

[10] Wolfram, H.: Salzburg, Bayern, Österreich. Die Conversio Bagoariorum et Carantanorum und die Quellen ihrer Zeit. Mitteilungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband 31. Graz–Wien–Köln, 1995. 193; Lošek, F.: Die Conversio Bagoariorum et Carantanorum und der Brief des Erzbischofs Theotmar von Salzburg. MGH Studien und Texte 15. Hannover, 1997. 6; Nótári T.: Conversio Bagoariorum et Carantanorum. *Aetas*, 2000/3. 93. sqq.; Nótári, T.: Show Trials and Lawsuits in Early-Medieval Bavaria. *Rechtsgeschichtliche Vorträge*, 53. Budapest, 2008. 66. sqq.

Salzburg had exercised for seventy-five years; in accordance with the judgment they held him in custody for two and a half years, and he was released merely owing to the Pope's intervention. The text analysed by the author was generated as a bill of indictment or a document to serve the subsequent legitimating of the lawsuit–that is, as deeds to legitimate claims of Salzburg in Moravia and Pannonia; which "conceal undesirable and 'dangerous' connections and facts and relate events far from each other with a considerable amount of cunning."[11]

Before expounding the accusations formulated in *Conversio,* Nótári outlines the development of the mission among the Carantanians and in Pannonia; then, gives an overview of the activity performed by Constantine and Methodius on these territories. He makes a detour to describing briefly the missionary activities performed by the Pope, the *basileus* and the eastern Frankish ruler in Bulgaria in order to make the historic background complete, and so that the reader could become familiar with the circumstances of the lawsuit of Methodius held in Regensburg. The background of the accusations and the further progress of Methodius's teachings are expounded by the author in the mirror of the political conditions of the papacy, the Frankish kingdom and the Moravian duke. This Latin text is highlighted among the Bavarian sources presented in the volume owing to the fact that it comes from the period preceding the migration of nations and our conquest of key importance in Hungarian history, and–using the words of Samu Szádeczky-Kardoss–"the Avar Chaganat was a forerunner of the later Hungary".[12]

It should be pointed out that the public interested in Bavarian ecclesiastical, legal and political history has already had the opportunity to become familiar with the translations of the early medieval sources into Hungarian, published in the author's former volume for the first time;[13] and in this monograph, by analysing, in addition to the sources translated earlier, several other early medieval texts he introduces the reader to the history of early medieval Bavarian historiography and legal history.

Ildikó Babják

[11] Kahl, H.-D.: Virgil und die Salzburger Slawenmission. In: *Virgil von Salzburg – Missionar und Gelehrter.* Hrsg. v. Dopsch, H.–Juffinger, R. Salzburg, 1985. 112; Nótári, T.: Die Geschichte des Ingo bei Enea Silvio Piccolomini. In: *Studia Iuridico-philologica I. Studies in Classical and Medieval Philology and Legal History.* Hungarian Polis Studies 14. Debrecen, 2007. 283.

[12] Szádeczky-Kardoss S.: Az avar történelem forrásai 557-től 806-ig (The Sources of the Avar History from 557 to 806). Budapest, 1998. 9; Nótári, T.: On the Avar-related chapters of the Conversio Bagoariorum et Carantanorum. *Chronica,* 5 (2005) 26. sqq.

[13] Nótári T.: Források Salzburg kora középkori történetéből (Sources from the History of Early-Medieval Salzburg). Szeged, 2005. passim

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CSABA VARGA*

Legal Philosophy, Legal Theory – and the Future of Theoretical Legal Thought

Abstract. Surveying the ways along with the whys and hows-of connecting law and philosophising, as contrasted to the appearances of modern formal law, it is concluded that in the final analysis law is a façon de parler a specific communication, or game carried out in an open scene–, an actual event, if one played by humans practicing whilst simultaneously referencing it. The contemporary outcome of reflection upon its developments is (1) the reduction of legal philosophising to discourse-reconstruction, in terms of which instead of the issue of "what is it?", "all that notwithstanding: how can it be achieved?" is usually raised; (2) the unresolved enigma of natural law, calling for axiology to define at least some foundational standards as stepping stones (albeit without a claim that any statement has genuinely concluded from them or been subordinated to them, as in the classical era when natural law and positive law were at odds); and (3) positive law without legal positivism, according to which a new synthesis and correlation amongst humans' natural, societal and intellectual worlds is expected to be reached. At the same time, flourishing at the peripheries, a genuine foundation is coming to the fore, in order to suitably respond to global challenges.

Keywords: modern formal law, legal complexity, ontology of law; natural law, legal positivism, globalisation

Providing we had great truths indeed, they are not too many to change over time. In addition, I do believe there were and there are such. Nevertheless, the change of time does not so much concern the truth of something anyway, but rather–just as old recognitions live on in us too, so as to (when confronted to new problems) reveal new colours and connections, foreshadowing a deeper message–the enrichment and inner improvement of such truths, similar to the accumulation of experience in a lifetime (as concentric or nonconcentric circles), leading with new insights to incessantly renewing attempts at a synthesis momentarily taken.

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1. Law and Philosophy

It is our comprehension that originates the legal phenomenon. It is our comprehension that locates and presents law in a given form of phenomenon. The same comprehension that lets us perceive law in our social milieu at a given level and in a given way will let us perceive legal philosophy at another level and in another way. This law and this legal philosophy may then enter into communication with one another at levels and in ways according to their relationship.

1.1. Connections

Conceiving the world as the outcome of conscious planning, we may indeed declare (following the Evangelist of the New Testament who expressed it in unique conciseness) that "In the beginning was the Word".[1] On the other hand, relying on a rationalist explication founded on the mere empiricism of the laity of scholarship, on the basis of everyday experience we can contemplate a constantly renewing process of transforming our environment into increasingly complex structures through a series of self-organising artificial constructions.

In theology, on the one hand, law can from the outset be conceived of in the spirit of the human fulfilment of the work of Divine creation, as its application to human dimensions in implementation of the potentialities ordained by it. Or, we might even say that it is this theological philosophy itself that generates the law, by highlighting the former's values when defining the various paths that may equally be followed within it.

However, on the other, approaching the issue from the opposite side, viewing it as one of the homogenisations necessarily arising on the terrain of the heterogeneity of our everyday existence, we obviously have to see in the development of legal homogeneity, in its strengthening and achieving social autonomy in more than one respect, some kind of a basically praxis-bound process, within which the piece of knowledge that reveals itself to those involved in general theoretical investigations directed at law is to embody the continuous rationalisation of the practical responses given to timely challenges. In the beginning, this rationalisation is probably only *subsequent* to actual developments at the most. However, after legal homogenisation is accomplished, it is certainly *parallel* to them, and when, with conscious social planning and engineering (in brief: legal voluntarism), it comes to the fore and becomes exclusive, it is of a *determining* force as well.

[1] <http://scripturetext.com/john/1-1.htm>.

Ever since humans started philosophising about their world, they have also been reflecting on its order, on the latter's potentialities and limits. In this sense, legal philosophy is of the same age as human societal self-reflection. It by no mere chance that reasoning retrospectively, Greek philology has ever set the task for itself to reconstruct semantically–among others–the signs referring to the presence of some kind of law or legally relevant phenomena in the classical age, and designating them in one way or another, from the textuality of the available body of epic poems and from the mass of scattered linguistic fragments, in order to reconstruct those signs as contextualised by the contemporary worldview and underlying philosophy.[2] And since the time that all human endeavours have been added up to form some kind of formal law–whose archetypes can be encountered back in early legal formalisms (i.e., initiatives in the ancient Middle East and antique Greece and Rome, regarded today as primeval and analysed in modern reconstruction for the first time by *Sir Henry Maine*), albeit it began to achieve the level of its present-day domination from the reception of Roman Law, done first in Bologna, and in its most developed form as methodologically rigidified into doctrines, from the age of the codification of national laws in the 18th to 19th centuries[3]–, the positivity of the law (coming forward with a demand for acknowledgement of the law's reality as a fact) apparently conceals the underlying circumstance that behind the law as a reified structure functioning, so to speak, with a mechanical automatism, there are real human beings operating it, conditioned by their everyday lives, who have to assume this thoroughly responsible and responsive moral task with the strength of all their faculties and capacities.[4]

At the same time, a more or less regular "maintenance" is needed to make this everyday operation possible, which includes the law's cleaning (of useless parts and waste) and improvement (according to operational concepts and the

[2] Cf., by the author: *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999, 9 et seq.

[3] Cf., by the author: *Codification as a Socio-historical Phenomenon.* Budapest, 1991.

[4] In an own explication, spanning between the two end-poles of the evolvement of my personal line of thought from problem perception to a systematic explanation, cf., by the author. Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l'Ontologie de Lukács. In *Archives de Philosophie du Droit,* 25. Paris, 1980, 385–411, on the one hand, and *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999, on the other. See also, in an American context starting from leftist critical deconstructionism of the Critical Legal Studies, by Conklin, V. A.: Human Rights, Language and Law: A Survey of Semiotics and Phenomenology. *Ottawa Law Review,* 27 (1995–1996) 129 and *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering. Aldershot, 1998.

need to prevent its degeneration into social dysfunction), and also the constant clarification of the foundations required for its long term strategic further development. It is in the fulfilment of this latter function that the theoretical thought directed to law becomes visible to us again.

1.2. Appearances of Modern Formal Law

Regulation by law always takes place with the aim of pre-defining an unspecified and unforeseeable future and, thus, in view of granting itself an eternal validity. We know, nevertheless, that the routine arising from this is always temporary: after a certain period of time, the rules will inevitably be surrounded by a divergence from the rules (in form of exceptions), which sooner or later results in the formulation of new, more detailed rules. Behind the relative permanence of the legal form, there are opposing interests pressing against each other, to be squeezed into, while being solved in, it. They continuously address–while questioning–the given form. Meanwhile, they render it liveable, by re-assessing its contents through its practical interpretation–extending, narrowing, or just re-shifting its scope. Or, jurists must reason in terms of alternativity, searching for a suitable form, while the due form eventually found, crystallised as adjusted to the given task, becomes itself a *donné* for the next challenge, to be further formed and, thereby, also to be transcended, albeit at the same time it remains the basic assurance of the continuation of the same cultural framework for legal problem-solving, that is, of the continued respect for traditions in patterning and being patterned alike.

We might say that, firstly, positive *regulation*, secondly, the *Rechtsdogmatik* (elaborating conceptual contexts based on the generalisation of past practice and, thereby, demarcating its ways open towards the future) as well as, thirdly, *doctrine* (laying the theoretical foundations of the given branches of regulation) collectively constitute only a few fundamentals for legal practice. Of course, all this is scarcely visible in those thoroughly technicised and profoundly reified cultures in which law is rigidified into routines (as enclosed in) to the extent of becoming alienated itself; where a mass of juridified relationships, procedures and activities may require the intervention of professional management by legal technicians on a mass scale; and when our whole lives are almost entirely surrounded and mediated by various agencies of enterprise, trade and traffic, with standards reproduced in mass proportions. Well, such cultures are permeated with a constantly growing mass of formulas and thesauruses that have been generated, which then come to be broken down to procedural *modus*es, and subsequently generalised into blocks of schemes, only to be ultimately overfilled by interpretations interpreted and comments incessantly commented

upon. As is well known, all this takes place in view of the advancement of standardisation, implying extension to new fields, expansion in depth and details, as well as both application to relations altered in the meantime and, as a feed-back, re-consideration of the *ratio* underlying the given regulation. In our modern formal culture, it is all this that constitutes the medium of law-application, providing its standard framework and serving as its unceasing renewal, that is, a constant *Aufhebung* [transcendence in preservation] of this unbroken process.[5]

These reified structures suggest an approach in terms of language use and communication, that is, an autotelism and a self-propelling mechanism that, in a constantly broadening way, reproduce earlier well-devised potentialities and paths covered as practices, or forms, of human activity, definitely specified. For their phenomenal form–namely, the *conceptualisation* of their culture–does conceal the creativity of human intellect, while still, nevertheless, operating in it, that is, the practical aspiration to respond to new challenges at any time and, thereby, of course, also the need for a humane coverage behind the human response and the irrevocable responsibility to be borne for the consequences as well.

The object of theoretical jurisprudence seems to have become invisible meanwhile, in this enchantment. But it is certainly there, in a three-fold sense at least. Firstly, it presents itself *evidently* in strategic planning and decision-making, when we search the future or change this conceptualised culture as a result of new situations or modified recognitions. For intellectual constructions as considerations behind the formalistic pillars maintaining the appearance of routine need to be re-activated when, due to actual imperfections in regulation (even if with the appearance of formalistic automatism preserved), an original evaluation is taken in the form of a decision–either so gaps can be filled in law or in the classical cases of discretion. Secondly, germs of theoretical thinking are actuated *non-evidently* in everyday routine when we conceal our consequence-oriented practical reasoning by seemingly un-problematic sequences of derivation in legal decision-making, leaving the job to a subsequent analytical reconstruction that reveals that nothing but a choice between alternatives was actually to take place. And thirdly, *naturally*, we cultivate theoretical jurisprudence and use its results when, applying it to our situation, we offer a scholarly explanation of our societal world.

[5] Cf., by the author: Doctrine and Technique in Law. *Iustum Aequum Salutare*, 4 (2008) 23. & <http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>.

1.3. Differentiation in Complexity

The natural, societal and intellectual worlds of man constitute a kind of unity and continuity. Our natural environment is given even if we have altered it. The societal milieu around us has been brought about by the endless series of conventionalisations through generations (so we are, in fact, socialised to it as to something readily given, even if we constantly re-form it by our reconventionalising contributions). At an intellectual level, we approach these at a critical distance but with our specific judgement added. In the final analysis, there are tendential correlations prevailing in the triad of humanity's natural, societal and intellectual worlds, as the most varied impulses and recognitions, creative efforts and practical feedbacks that flow incessantly, are to bring about a state of equilibrium in any society, if viewed from a historical perspective. Anything that can be formed will eventually be formed in fact. This applies equally to our natural world and our concept of it,[6] the way our social institutionalisation works by fulfilling its function, and also to our intellectuality in all of this, forming them and being formed by our experience day to day. Neither a value judgement nor any approval is involved, only that a fact is established if we ascertain now that the complexity of our social existence has brought about a compound, internally so articulated in historical time, also that a process of the Ausdifferenzierung des Rechts[7] has taken place in it, in the major part of civilisations and cultures at least. Our social objects, reified practices and alienated products are all embodied by objectivations that we have to consider–nolens, volens–as part of our societal world, to be treated as independent subjects of cognition.

Law? This is something prevailing and operating, with a place firmly demarcated by universally shared social conventions in our everyday life. Apparently, it separates from anything else solidly like a rock, and only a theoretically deconstructive reconstruction can prove after the fact that, in the ultimate analysis, law is hardly more than a manner of speech, specific communication or a game collectively played. This is all that can be taken as real–

[6] John Lukács mentions a noteworthy example in his *At the End of an Age* [2002] (in Hungarian translation *Egy nagy korszak végén.* Budapest, 2005, 128, note 80), related to the change of the cultural landscape of the Swiss mountains, describing how it developed from bleakness too dreary for life to a serene charm of prosperity, which the author attributes to the change in human understanding in the meantime and to their human habitation, based first of all on societal adaptation to the milieu.

[7] Cf. Niklas Luhmann *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie. Frankfurt am Main, 1981.

inasmuch as it is actually used as a basis of reference.[8] However, according to the law's own rules of the game, such a specific (legal) communication presupposes from the outset that such references are actually made at every major crossroads and at each new start. And the extent to which such references can be made at all is delimited by so-called validity in that order of speech. And validity covers the field generated according to this very rule of the game.[9]

2. Conclusions

First of all, two substantial conclusions ensue from all this. Both might have already been obvious decades ago. However, they are elucidated with proper sharpness only because our age involves so many dangers and threats. Finally, a third conclusion can also be drawn from these, based on some tendencies already visible in our present.

2.1. Legal Philosophising Reduced to Discourse-reconstruction

As can be seen, legal theorising starts above all by rendering problematic that which may appear unproblematic in everyday life, that is, when we question the seemingly self-evident, notably, the why and wherefore of the judicial routine's alleged rule-conformism–with proper impoliteness and irreverent disrespect of tradition. Well, it is this–namely, the systematic cultivation of heretical incredulity that may in principle arise in any participant of the so-called judicial event, if organised into a grand-theory–that goes on nowadays mostly under the aegis of professional legal theorising. What I have in mind here is a kind of contrast. For, just a few decades ago, we inquired–solemnly and seriously–into the "epistemology and methodology of law", the "theory of jural relations" and the law's voluntary nature, as well as all kinds of other labels and features attributed or related to law; just as, first, the biophysicist, then, the biochemist approach the (animal/human) body, only to hand over their symbolic lancet to the anatomist, and finally to the pathologist, enabling

[8] As known, Scandinavian legal realism did the most for having this realised. Cf., e.g., Visegrády, A. (ed.): *Scandinavian Legal Realism.* Budapest, 2003 and, as a background, by the author: Skandináv jogi realizmus [Scandinavian legal realism] in: Varga Cs. (ed.): *Jogbölcselet* XIX–XX. század: Előadások [Lectures on 19th to 20th century philosophy of law]. Budapest, 1999, 81.

[9] Cf., by the author: Validity. *Acta Juridica Hungarica,* 41 (2000) 155 & http://www.situation.ru/app/j_art_724.htm & <http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612>.

each of them to cut out what they need–with the presumption that all we had thought about it also had to be seen in both the living and the dead. In such a corporeal view of law, muscles may have creaked and sinews and bones rubbed at the most; still the body as such could function. Well, in contrast to the forceful articulation of such a splendid simple-mindedness–*sancta simplicitas*–, what we do today is at the most to break forms and differentiate according to qualities related or ascribed to law in our speech acts. For what we do here is analysis: we operate concept with concept and lift it (as latter-day followers of baron *Munchausen*) out of what is itself, in order to finally place it back into what is again just itself. Instead of the old-fashioned, static dissection of the law's allegedly discrete (i.e., separately examinable) composing parts, we now make a theory out of what we once were prudently reluctant even to notice. As a somewhat bizarre example, this is as if, in athletics (and due to some strange motive), we suddenly started to concentrate–instead of on efforts or the implied aesthetics–on the body's urinary output or perspiration curves, that is, on the so-far concealed problem of how the judge can proceed by means of steadily manifesting the appearance of being logical when the inference that is practical anyway is anything but logical.

This change in character shows clearly that we are more fashion-conscious than we had thought ourselves to be, at least in one sense of the word. Notably, our interest in any given subject (including the underlying selection made) is also promoted by the trends of the age. Today, the question is raised not in terms of "*what?*" but in terms of "in spite of all that: *in what way?*" For, we do not see a naturally given *donné* in the subject but a virtual construction to be deconstructed. In reality, we cut pieces from our subconscious under the microscope. We boast of being quite detached in scholarship while we have become narcissistic self-dissectors in practice. The spirit of our age focuses as to contemporary theoretical jurisprudence not only on the issue of "how?" but has, all of a sudden, created a human reflex or conceptual relation out of yesterday's interconnection of independent entities. So, we do search for phrases and frequency in linguistic practice (i.e., the preliminaries supposed to be sensible of a seemingly sensible statement) in the law–instead of inquiring as to its "reality" earlier believed to exist.[10]

All this is not turning grey but is a projection of, or mental reaction to, the change of the very subject of cognition as a socially generated objectivation.

[10] As a background, cf., by the author: Theory and Practice in Law: On the Magical Role of Legal Technique. *Acta Juridica Hungarica*, 47 (2006) 351 & <http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>.

2.2. The Query for Natural Law Unresolved

The other conclusion relates to the prerequisite of such a practice, to the question of whether or not the law has the exclusive criterion of a *validity* exhausted by formal procedurality (preconditioned by some factually empirical and quantifiable *efficiency*), and whether or not any other factor (aspect or feature) can have any similar criterion-setting role. Providing that the law of our modernity has indeed developed in this way (i.e., in autonomous disconnection from other factors of social complexity, resulting in the law's separation from its framework environment basically defined by *theologicum* and *ethicum*, permeating and eventually also dominating all forms of human attitude within the *ordo* of our social milieu), then obviously the social complexity's qualities and *imperativum*, having once constituted the *sine qua non* condition of their minimum contents, also will vanish from what can by now be rightly called *modern formal law*.[11] In this case, what is left of the feasibility of an axiological approach to law? It would be too little comfort to say that value-dependent approaches are unchangingly given free scope in legal policy [*Rechtspolitik*] and the theory of legislation [*Gesetzgebungslehre*] as well as in the doctrine of law-application [*Rechtsanwendungslehre*], re-arranging the alternative options (implying the moment of an independent *decisio*) into a unidirectional logical sequence of inference both verbally and culturally (as the latter does not necessarily raise awareness of the discretionary power that is made to work there by decision-makers anyway).

Regarding the, so-to-speak, permanent conflict between *natural law* and *legal positivism*,[12] we can only ascertain that the former is increasingly losing ground up to the point that we cannot now think of this opposition otherwise than as the symbolic expression of the challenge since classical times (from ancient Greeks, via Romans and the Medievalists, to early modernity) to break away from the one-time role of *ancilla theologiae* to achieve the *renaissance* of human quality, practically transplanted onto our earthly order as well. Otherwise speaking, the respect for human interests (with sheer utility in focus) in *praxis* has found a most promising terrain in the meantime. And irrespective

[11] Cf., by the author: Moderne Staatlichkeit und modernes formales Recht. *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 235 and The Basic Settings of Modern Formal Law in: Gessner, W.–Hoeland, A.–Varga, Cs. (ed.): *European Legal Cultures*. Aldershot–Brookfield USA–Singapore–Sydney, 1996, 89.

[12] See, e.g., Szabó, M. (ed.): *Natura iuris* Természetjogtan & jogpozitivizmus & magyar jogelmélet [Natural law & legal positivism & Hungarian legal philosophy]. Miskolc, 2002.

of whether there is still monocracy or representative democracy has already been invented, the law itself has finally become optional, scarcely differing from the characterisation set out in the *Communist Manifesto* one and a half centuries ago: a will made dominant through having been wrapped into state-controlled formalities.[13] And, thereby, the desirability of linking the quality of *right* with *the right*[14] is smoothly transferred into an issue of mere intellectuality and only for highbrows' use. In other words, having arrived at modernity, our societal world has also separated from our intellectual world. For, in a criterion-like way, the law itself has become value-free (or, properly speaking, value-neutral), not followed (or only hesitatingly followed) due to lawyers' professional ideology itself having become value-free or even cynical.[15]

We know from the research of a Hungarian-American Benedictine friar science historian[16] that the history of science can explain the separation of Christianity and Islam (with the evolutionary ability of the very idea of *scientia* emerging exclusively from the former's culture) by the fact that theological debates after the turn of the First Millennium had already declared the chance of our fallibility on earth, that is, that our Earth has indeed been made our possession, and our actual life our eventual fate, as Divine Providence is not to interfere with either the laws created in our world or our irrevocable choices between good and bad. Or, neither genuine ontology nor human anthropology (with the chance of humanity's fall into sin) is excluded by far as true scholarly fields. Thereby, it is possible to formulate repetitive regularities as laws, and human striving for their cognition and honest actions within their terms are not faint-heartedness but rather the fulfilment of an assignment from the Creator. On the other hand, this awareness, born in Europe around the 11th to 13th centuries and which allowed us to live happily in our world and ensured the subsequent *renaissance*–that is, the relative separation of the spiritual from the natural world–has not been repeated so obviously in societal and intellectual aspects.

[13] Cf., e.g., by the author: Marxizmus in *Jogbölcselet* [note 6], 24.

[14] See Sebastião Cruz *Ius. Derectum (Directum)* Dereito (derecho, diritto, droit, direito, Recht, right, etc.) 7.ª ed. Coimbra, 1986, and Lalinde Abadía, J.: *Las culturas represivas de la humanidad* (H. 1945) I–II. Zaragoza, 1992, as well as Kovács, F.: *A magyar jogi terminológia kialakulása* [The evolution of Hungarian legal terminology]. Budapest, 1964.

[15] For its ontological and epistemological interrelations, see, by the author. *The Place of Law in Lukács' World Concept.* Budapest, 1985.

[16] Jáki, Sz.: *A természettudomány eredete* [Lecture on the origin of natural science]. Győr, 1993 and Jaki, S. L.: *The Origin of Science and the Science of its Origin.* Edinburgh, 1978, & *The Road of Science and the Ways of God.* Edinburgh, 1978, as well as his *Jesus, Islam, Science.* Pinckney, Mich., 2001.

Just to refer to some great decisive events: for example, the great classical periods of *natural law* became, as it moved towards modernity, replaced by new constructs. However, the long-standing requirement of justification by natural law, on the one hand, and the frightening desolateness of the gap left after it was ousted from the proper terrain of law (with its space filled only by legal voluntarism), on the other, prevented the issue from being closed down entirely forever.[17]

The lack of a theoretical response re-appeared in a new light when, within the critical perspective of the *Social Doctrine of the Church* in the immediate present, the classical spiritual power raised its voice at last and started to speak up against the dehumanising dysfunctionality of the social and economic arrangements of the Western world. For it is obvious that the Gospel does have a message in general, but the question of what the indubitability of natural law (to the extent it can be so characterised) really means for positive law has not been answered reassuringly ever since the age of *Saint Thomas Aquinas*. Anyway, the commitment of our life on Earth does not allow us to handle ourselves, our societal surroundings or the order to be made on earth with the indifference characteristic of laws built into physicality and with a demand for total autonomy. As is well known, the social teaching of the Church obviously derives its arguments from the Gospel, but it does so through interpretation embedded into theological hermeneutics of the ages given at any time, combined with a striving to give a temporal answer adjusted to the situation *hic et nunc*, i.e., with a kind of optimisation of the expectations (conceived of as best) of the society and culture behind the actual teaching.[18]

Finally, the barbarity of the last century, then the debasement of person against person followed by the technocratic emptying of our future, accompanied by the unlimited exploitation of our planet's reserves, that is, the *ideocracy of socialism* being replaced by the all-covering *pragmatic homogenisation through globalism*–

[17] In his oeuvre, Michel Villey analysed the process repeatedly in his *Leçons d'histoire de la philosophie du droit* nouv. éd. [1957]. Paris, 1962, *Seize essais de philosophie du droit* dont un sur la crise universitaire. Paris, 1969 and *Critique de la pensée juridique moderne*. Paris, 1976, as well as in his magisterial lecture notes on *La formation de la pensée juridique moderne* rév. Stéphane Rials, Paris, 2003.

[18] The author referred to in the previous note struggled with the issue recurrently. He concluded that Saint *Thomas Aquinas* had already considered the very notion of practice-bound secular laws as something separate , considering the fact that neither the Gospel nor any conception of natural law would be capable (or competent) to cover it throughout and directly. See Michel Villey *Questions de Saint Thomas sur le droit et la politique* ou le bon usage des dialogues (Paris) 1987, as well as, as fragments from him, éd. Frison-Roche, M.-A.–Christoph, J.: *Les Carnets* Réflexions sur la philosophie et le droit (Paris) 1995.

along with the general mood of some ultimate scenario of *finita la commedia!*[19]– have since World War II repeatedly raised the query of how to render the law autonomous. Well, the legal accountability for Nazi-type depravity (the so-called *Radbruch*-formula), the possibility to rebuild civil conditions in relative freedom from codal restrictions ("*die Natur der Sache*"), then, most pressingly nowadays, the unsolved issue of Latin American and other disintegrating failed societies, the squandering of our Planet's resources using up humankind's future, the anti-human usability of the possibility of immeasurable manipulation generated by the newest technologies, the ultimate degradation of the Western world through an internal moral split of dual standards, enforced by diverging interests, and last but not least, the destructive dysfunctions arising from the universalisation of the Atlantic legal mind and US state-craft (as extended especially to the Eastern European regions and so-called developing societies, exposed to the imperialism of the American movements of Law & Modernisation and Law & Development)–all these call for some kind of external objective measure.[20]

Albeit we have to know that a revival of natural law in our day cannot target more than the expansion of sensitivities and the extension of the range of topics and aspects of investigation, with their re-integration into our culture. Otherwise speaking, it cannot claim a new deduction [*Ableitung*] or subordination [*subordinatio*], as this would lead back again to a pre-scientism. Therefore, the question is partly open, waiting for both a response and a foundation in theory.

2.3. Positive Law – Without Legal Positivism?

As was pointed out earlier, things are mostly interconnected, and it is only due to a lack of perspective if we cannot perceive latent correlations for the time being. Well, our earlier thesis on the change of focus of theoretical legal thinking in the past few decades was largely due to the metamorphosis of our world-view in the philosophy of science, a circumstance that may explain the tendency of law to have become increasingly immaterial, to be taken as hardly more

[19] "The show's over."

[20] Some cardinal aspects are analysed in a pathbreaking concise overview by the present pope, then Cardinal Joseph Ratzinger, in his *Crises of Law* [an address delivered on the occasion of being conferred the degree of Doctor *Honoris Causa* by the LUMSA Faculty of Jurisprudence in Rome on November 10, 1999 in <http://www.ratzinger.it/conferenze/crisideldiritto_eng.htm>. As to actualities in the region, cf., by the author: *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest) 1995. and *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe. Pomáz, 2008.

than a discursive process within the frame of specific communication[21]–such a thesis by no means supplies a sufficient (let alone exhaustive) explanation. It has been discernible in both the description of the Western European and Atlantic legal world[22] and the design of the common codification of private substantive and procedural law in the European Union[23] (requiring Hungarian participation as well from now on) that–starting from the era of Western rebuilding after the Second World War[24]–it is the resolution of the exclusivity of the law's positivity (or being posited) that has been increasingly reckoned with. All this is palliated with fashionable liberal catch-words, labelled as democratisation, participation, or multi-factoralisation of the legal process. If, and insofar as, this resolution becomes dominant (as prognosticated by American macro-sociological grand-theories for decades now[25]), it will also obviously increasingly eliminate the alienating effect of the special modes of speech and culture of communication that may still have made the impression of being self-propelled in law and that have successfully ousted both pragmatic and evaluative reasoning from routine procedures, reducing them to mere pattern-following.

Accordingly, philosophical reflection on law with expectations of theory-building is anything but a memory of the past. It is by far more an agenda addressing the future. Legal philosophising is going to become part of such a legal culture in constant formation.[26] That is, what we will then call law will

[21] See para. 2.1.

[22] E.g., by the author: Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada) *Acta Juridica Hungarica,* 44 (2003) 21.

[23] E.g., by the author: La Codification à l'aube du troisième millénaire. In: *Mélanges Paul Amselek* org. Cohen-Jonathan, G.–Gaudemet, Y.–Hertzog, R.–Wachsmann, P.–Waline, J.: Bruxelles, 2004, 779 & Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica,* 47 (2006) 89. & <http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf>.

[24] In an edifying comparison with Central and Eastern European peripheries, see, above all, Kühn, Z.: Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. *The American Journal of Comparative Law,* 52 (2004) 531.

[25] First of all, e.g., Nonet, P.–Selznick, P.: *Law and Society in Transition.* Toward Responsive Law. New York, etc., 1978. and Mangabeira Unger, R.: *Law in Modern Society.* Toward a Criticism of Social Theory. New York, 1976. As a contemporary reflection on these, see, by the author: Átalakulóban a jog? [Law in transition?] *Állam- és Jogtudomány,* 23 (1980) 670.

[26] Albeit "cultural lags" are too well known here as well. Cf., e.g., by the author: What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of 'The Judicial Establishment of Facts'. In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–

define or demarcate its object together with what we think of it with good reason and conclusive force. We shall presumably remember legal philosophy up to the end of the 20th century as an interesting but mostly dated preliminary that undertook the task of founding (at a mega-level of science philosophy and science methodology) the *science of the law* that, in addition to positive analyses of a *Rechtsdogmatik*, dissected the law into parts–as a researcher examines an insect on his table or liquids in retorts, to be able to inspect each of its methodically separated components individually. It is conceivable that–as usual–primarily those moments from this philosophising that might have contributed to the precise transcendence of this all will survive memorably for posterity.

The triad of the *Hegel*ian thesis / antithesis / synthesis may prove to be rather too attractive. All that notwithstanding, I cannot ignore, by formulating my suspicion, that it will be a kind of repeated encounter, moreover, a reunification of the *societal* and the *intellectual* (referred to already several times) that will again re-occur in the legal philosophy of the near future. The aforementioned catch-words of the resolution (or dissolution) of the law's positivistic self-definition themselves seem to refer to something like this. The realm of values behind the law, demanding their re-integration in transcendence, also suggests something similar. Man is to return to himself (as I formulated somewhat lyrically in conclusion to my treatment of the law's paradigms twenty years ago[27]), and theoretical thinking built on philosophical reflections may be the most adequate avenue to bring this about.

Wyduckel, D. (Hrsg.): *Theorie des Rechts und der Gesellschaft.* Festschrift für Werner Krawietz zum 70. Geburtstag, Berlin, 2003, 657.

[27] "We followed a path that led to law from the paradigms of legal thinking, and from the self-assertion of legal formalism to its overall cultural determination. Yet, our human yearnings peeked out from behind the illusory reference of our security and we could discover reliable, solid grounds only in the elusive continuity of our social practice. In the meantime it proved to be a process which we had thought to have been present as a material entity and what we had believed to be fully built up proved to build continuously from acts in an uninterrupted series. What we have discovered about law is that it has always been inside of us, although we thought it to have been outside. We bear it in our culture despite our repeated and hasty attempts at linking it to materialities. We have identified ancient dilemmas as existent in our current debates as well. We have found long abandoned patterns again. We have discovered the realisations of common recognitions in those potentialities and directions in law which we believed to have been conceptually marked off once and for all. / However, we have found an invitation for elaboration in what has revealed itself as ready-to-take. Behind the mask, and in the backstage, the demand for our own initiation, play, role-undertaking and human responsibility has presented itself. We havebecome subjects from objects, indispensable actors from mere addressees. And, we can be convinced that despite having a variety of civilisational overcoats, the culture of law is

We live in a dangerous age. These dangers include the saturation of our environment with poisons, both in nature and in our societal world, as much as in our intellectuality–freed of standards, endangering mental survival itself. Forces ready to act are nowadays making experiments by erecting a new and idea-controlled brave new world, and our perennial cultural diversity, homogenised in a global village, is being visualised by some as already accomplished.[28] In one of the richest (yet in many respects most innocent) parts of the world, the future is feared as bringing with it commercialisation of legal education and scholarship, with the results of legal research being ordered in advance as ready clichés to justify whatever policies are desired. Such a resignation to predestination by fashionable global policies may emerge that finally we shall sink into, dragging like superannuated spinsters, a wretched life, drawing on what it may have left.[29]

There are several signs indicating that situations are always double-faceted. Now we cannot conclude more from such a threat than that it can also be beneficial to be a local on the peripheries.

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still exclusively inherent in us who experience it day by day. We bear it and shape it. Everything conventional in it is conventionalised by us. It does not have any further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be borne for it on somebody else either. It is ours in its totality so much that it cannot be torn out of our days or acts. It will thus turn into what we guard it to become. Therefore, we must take care of it at all times since we are, in many ways, taking care of our own." Varga: *Lectures*... [note 2 {first Hungarian ed. in 1997}], ch. 7, p. 219.

[28] C.f., e.g., in representation of two poles, *Zum 80. Geburtstag von Hermann Klenner.* Berlin, 2006. [Joachim Herrmann, Gerhard Sprenger & Hermann Klenner, 1–55], on the one hand, and *The Governance of Globalisation.* The Proceedings of the Ninth Plenary Session of the Pontifical Academy of Social Sciences (2–6 May 2003). Vatican City, 2004.

[29] For example, according to the cry for help by an author not inclined to pessimism otherwise, "L'enseignement sera une marchandise." There may scarcely be other chance than "se vendre pour rester des facultés de droit dignes de ce nom, ou refuser de se vendre et vieillir comme des vierges stériles." (16) "[L]e travail scriptuaire universitaire [...sera...] se concrétiser comme »fournisseur de prémisses« justifiant toujours une quelconque politique ou une orientation idéologique" (17). The perspective therefore is hardly more than "l'exploitation de la recherche [...] pour obtenir une légitimation, une justification des politiques étatiques ou de l'industrie." (18) Melkevik, B. Scolies sur le futur des facultés de droit. *Le verdict* Audi alteram partem. *Journal de la Faculté de Droit de l'Université Laval,* Québec, 4 (2005) 14.

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Police Ethnic Profiling in Hungary – An Empirical Research[1]

Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion

Abstract. Profiling by law enforcement agencies has become one of the most widely researched and debated questions in legal discussions relating to ethnic and racial discrimination in the criminal justice system. This research report highlights the findings of a recent pilot research project organized by the Hungarian Helsinki Committee that focused on police stop and search practices and their discriminatory effects on Hungary's largest ethnic minority, the Roma. As part of the research, for the first time in Hungary, broad-spectrum data collection on the ethnic aspects and general efficiency of ID checks has been conducted.

Keywords: criminal justice, discrimination, ethnic profiling, law enforcement, police, Hungarian Helsinki Committee

Profiling by law enforcement agencies has become one of the most widely researched and debated questions in legal discussions relating to ethnic and racial discrimination in the criminal justice system. The term refers to the law enforcement practice of using racial, ethnic or religious stereotypes when making decisions on whose documents to verify, whom to stop, search, arrest or detain, on whom to mine databases, gather intelligence and employ other techniques. The policy assumes that these characteristics will help predict which people will be involved in particular crimes. Some commentators emphasize that ethno-racial profiling is in principle unacceptable. The result, according to these

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critics, is the harassment of the innocent minority middle class, which is subjected to a kind of "racial tax" that affects all aspects of people's lives. A further unwanted result is the strengthening of racial/ethnic essentialism, reductionism to black and white/Muslim and non-Muslim/Roma and non-Roma/immigrant and non-immigrant, etc. Another, straightforwardly pragmatic criticism has been calling attention to the practical ineffectiveness of racial profiling: inherent in the prima facie plausible reasoning based on statistics there is a profound (and provable) error, since racial profiles are both over-inclusive and under-inclusive: over-inclusive in the sense that many, indeed most, of the people who fit into the category are entirely innocent, and under-inclusive in the sense that many other types of criminals or terrorists who do not fit the profile will thereby escape police attention.[2] Either way, there seems to be a consensus that profiling is a form of discrimination and is consequently unlawful according to international and European law. A number of organizations such the Committee for the Elimination of Racial Discrimination, the Council of Europe Committee of Ministers, European Commission against Racism and Intolerance (ECRI), the European Parliament, the OSCE High Commissioner on National Minorities, and the EU Network of Independent Experts on Fundamental Rights[3] have made

[2] See for example Banks, R.: Racial profiling and antiterrorism efforts. *Cornell Law Review*, 89 (2004) July, Harris, D. A.: Racial profiling revisited: "Just common sense" in the fight against terror? *Criminal Justice*, Summer 2002, Bygrave, L. A.: Minding the machine: Article 15 of the EC Data Protection Directive and Automated Profiling. *Computer Law & Security Report*, 17 (2001), Cuéllar, M.-F.: Choosing Anti-Terror Targets by National Origin and Race. *Harvard Latino Law Review*, 6 (2003), Davies, Sh.: Reflections on the Criminal Justice System after September 11, 2001. *Ohio State Journal of Criminal Law*, 1 (2003) Fall, Delsol, R.–Shiner, M.: Regulating Stop and Search: "A Challenge for Police and Community Relations in England and Wales". *Critical Criminology*, 2006, Goldston, J.: Toward a Europe Without Ethnic Profiling, Justice Initiatives. *Open Society Justice Intitiative*, June 2005, Gross, Samuel R.–Livingston, D.: Racial Profiling Under Attack. *Columbia Law Review*, 102 (2002) June.

[3] Committee for the Elimination of Racial Discrimination (CERD), General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), Council of Europe Committee of Ministers Recommendation (2001)10 to the member states on the European Code of Police Ethics, European Commission against Racism and Intolerance (ECRI) General Policy Recommendation N°1 On Combating Racism, Xenophobia, Antisemitism And Intolerance, ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, ECRI General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism, ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, European Parliament Committee on Civil Liberties, Justice and Home Affairs, Working Document on the problem of profiling, notably

recommendations to legislators, policy-makers and law enforcement executives to combat racial profiling.

In line with these efforts, in the past years, the Hungarian Helsinki Committee (HHC), has been active in both mapping out patterns of discriminatory practices and formulating recommendations for legislative amendments and policy development.[4] In the following, we will highlight the findings of a recent pilot research project[5] that focused on police stop and search practices and their discriminatory effects on Hungary's largest ethnic minority, the Roma.

Since previous research has showed that discriminatory ID check methods are relevant to the differential treatment of the Roma,[6] Strategies for Effective Police Stop and Search (STEPSS), an international project supported by the AGIS Program of the European Commission and the Open Society Institute and organized by the Open Society Justice Initiative was launched to change police stop and search policy and practice. In Hungary, a research/action

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on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control, Rapporteur: Sarah Ludford., 30.9.2008, DT\745085EN.doc PE413.954v02-00, EU Network of Independent Experts on Fundamental Rights on ethnic profiling, Opinion 2006/4, OSCE High Commissioner on National Minorities Recommendations on Policing in Multi-Ethnic Societies, February 2006.

[4] Research by the Hungarian Helsinki Committee in 2002–2003 concerning discrimination against Roma in the Hungarian criminal justice system exposed direct racial profiling by the police. By scrutinizing court files, the researchers found that Roma offenders and suspects were significantly more likely to have been identified via police stops while non-minority suspects were mostly caught in the act. One good source for the difference, explained the researchers, might be the police stop practices. On average, one-fifth of researched court cases involved individuals identified by police stops. See Farkas, L.–Kézdi, G.–Loss, S.–Zádori, Zs.: A rendőrség etnikai profilalkotásának mai gyakorlata (The Current Police Practice of Ethnic Profiling). *Belügyi Szemle* (Interior Affairs Review) 52 (2004).

[5] For the full report see: Kádár, A.–Körner, J.–Moldova, Zs.–Tóth, B.: Control(led) Group. Final Report on the Strategies for Effective Police Stop and Search (STEPSS) Project, Hungarian Helsinki Committee, Budapest, 2008. The report is available ont he Helsinki Committee's website: http://helsinki.hu/dokumentum/MHB_STEPSS_US.pdf

[6] In 2005, a research carried out under the aegis of the Open society Justice Initiative found that the Roma are indeed discriminated against in the context of ID checks by the police. Discrimination was especially conspicuous in the practice of stopping pedestrians, with Roma pedestrians disproportionately stopped are more likely to experience disrespectful treatment. See: Pap, A. L.–Miller, J.–Gounev, P.–Wagman, D.–Balogi, A.–Bezlov, T.–Simonovits, B.–Vargha, L.: Racism and Police Stops–Adapting US and British Debates to Continental Europe. *European Journal of Criminology*, 6 (2008) 161; and Pap, A. L.: Police ethnic profiling in Hungary–Lessons from an international research. *Regio*, 10 (2007) 117.

approach was used in the development of new practices in pilot sites. For the purposes of the research, for the first time in Hungary, broad-spectrum data collection on the ethnic aspects and general efficiency of ID checks has been conducted. (As for the action element, not discussed in this paper, officers were trained on the definition and relevant aspects of ethnic profiling.)

Research Design

The project involved the close cooperation of the HHC, the National Police Headquarters (NPH), the Hungarian Police College (HPC) and selected representatives from the Roma community who performed the internal monitoring of the project. The research was carried out for six months in three pilot sites across Hungary: Budapest's 6th District, Szeged and Kaposvár. These three locations represent a broad range of different police districts with differing populations, crime profiles and resources. Budapest's 6th District covers a busy city-center area and includes the capital's main railway station. Szeged, with a population of 200 000, is a medium-sized district on the Romanian border. Kaposvár is a relatively rural police district with 120 000 inhabitants.

The project design was approved by Hungary's two Parliamentary Commissioners, a specialized ombudsman for ethnic and national minority rights and the Data Protection Commissioner. His involvement was required because according to the Data Protection Act,[7] data related to ethnic affiliation or origin are regarded as sensitive data which can only be lawfully processed if an Act of Parliament permits, or the person concerned gives his/her written consent to processing the data.[8] As such, police officers were not, and are not authorized by law to process data of ethnic origin during the course of conducting ID checks, and it would not have been practically feasible for the police to ask for consent during the stop. Thus, officers were asked to record the *perceived* ethnicity of the person stopped on a separate and anonymous "STEPSS form". These forms were to be stored separately from the standard ID check forms that the police have a legal obligation to complete. After each shift, the officers who performed ID checks handed over the "STEPSS forms" they had filled out to the appointed contact person who at the end of each week

[7] Act LXIII of 1992 on the Protection of Personal Data and Publicity of Data of Public Interest.

[8] Articles 2 (1) and 3(2) of the Data Protection Act.

forwarded them to the NPH, from where it was sent to the HHC, where following data analysis, the forms were destroyed.[9]

The forms were designed to detect any disproportionate treatment in stops of minority citizens, chart how stops are being used by officers (reasons for stops, suspicion, location, outcomes), and provide a tool for enhanced supervision. Questions concerning the result of the ID check, where aimed at showing whether the stop was followed by further police measures, such as the arrest of a person under an arrest warrant, the short-term arrest of the person checked, or the initiation of petty offense proceedings.

Research Findings

1. The Number of Stops

During the six months of data collection (17 September 2007–17 March 2008), the three Hungarian police units participating in the project performed altogether approximately 36 939 ID checks. Of these stops, 22 375 were recorded on the forms developed as part of the project. Overall, the numbers represent a decrease in the number of ID checks from the previous year. In Budapest, there was a drastic, 75.3% decrease in ID checks compared to the same period in the preceding year (14 362 to 3538). In Szeged, the total number of such measures dropped by 17.5% compared to the same period in the previous year (16 724 to 13 786), while in Kaposvár there was a slight (4.7%) increase (24 606 to 25 770). The decrease in overall stop numbers may have several reasons. One of these is the general loss of self-confidence on the

[9] The form contained the following data: time and place of ID check, gender and age of person stopped, grounds for the stop, results of ID check, perceived ethnicity of the person stopped, as established by the officer, and the civil monitor's remark. The list of typical reasons for ID checks was prepared by the NPH, and included the following: *possession of a suspicious object* (the officer has to state the reasons for her assumption); *intensive control* (ID checks carried out for this purpose do not needed to be justified, since this raid-like action includes everyone in the area); *traffic control; security measure* (this measure is applied against persons posing danger to the public or themselves, the situation needs to be described) *finding a wanted person* (along a reasoning for believing why the individual was the suspect); *suspicion of a crime or a petty offense* (along proper reasoning for the suspicion); *prevention of an act endangering public order* (along with the description of the event); *possession of an illegal object* (along with proper reasoning for the suspicion); *other reason, namely* (the officer has to explain the actual, alternative reason).

part of the police, which, according to a number of officers participating in the project, started with the widely publicized instances of excessive use of force during the Budapest riots of October 2006. As a result, there has been a decrease in police activity throughout the whole country. The decrease may also be caused by the increased administrative workload on the officers (i.e. the filling out of the form). This is substantiated by the fact that in Budapest, the decrease was radical (over 70%) compared to the same period in the previous year, but after the monitoring phase was over, the monthly average of ID checks increased by 25%. Curiously, when asked about the possible explanation for the trends and numbers, none of the interviewed police officers mentioned the January 2008 amendment of the Police Act, which set forth a more stringent framework for performing ID checks. Overall in Budapest, there were 93 ID checks per 1000 people, in Kaposvár 353, and in Szeged 147.[10] To put this into an international context, the police in the UK conducted 59 stops (stop and search plus stop and account measures) per 1000 people during the years 2006–2007.[11] The average annual number of stops per 1000 people in the three Spanish project sites was even less: 16. Thus, ID checks play a much more important role in the Hungarian police's relations with the general public than it is the case in other European countries.

2. *The Effectiveness of the Stops*

The effectiveness of ID checks can be determined by examining what percentage of ID checks are followed by further police measures (such as arresting a person based on a warrant, initiating criminal or petty offense proceedings, etc.). This is often referred to as the "hit" or "success" rate. The project identified three main types of follow-up procedures (i.e. positive results proving that the check was well-grounded): (a) arrests, (b) short-term arrests and (c) petty offense procedures initiated (including on-the-spot fines).[12]

[10] These involve not only discretionary stops on the street of those suspected of committing a crime, but also checks of people that witness crimes and accidents, report something to the police or ask for help, etc. When asked about the approximate proportion of such checks (i.e. checks not initiated by the police), different estimations were given by the competent police officers: 10% in Kaposvár, 20% in Szeged and 30% in Budapest. If we adjust the above numbers using this data, we still get very high numbers: 65 checks per 1,000 people in Budapest, 325 in Kaposvár, and 93 in Szeged.

[11] Jones, A.–Singer, L.: *Statistics on Race and the Criminal Justice System – 2006*, London, 2008.

[12] It is important to note that in a large number of cases, ID checks form an inevitable part of the petty offense procedure and are not necessarily the starting point. For example,

Overall, including traffic related checks, only 1% of ID checks led to an arrest, 2% led to a short term arrest and 18% to petty offense procedures. Put simply, out of every 100 persons ID checked, only two were taken into short-term arrest, and only one was arrested. If ID checks related to traffic offenses are removed, the remaining checks result in 2% arrest, 3% short-term arrest, 19% petty offense procedure and 76% no further action taken. For comparison, in the UK nationally 10–13% of stop and searches lead to arrest.[13] On the whole, it appears that the police use of ID checks is ineffective; large numbers of people are being inconvenienced with little result. This data refutes the argument that extensive checks are an efficient tool against criminality, and highlights the sheer amount of police time wasted conducting stops.

This conclusion is further substantiated by the local data the participating headquarters provided after the monitoring phase was completed: in Kaposvár, where the number of ID checks increased during the project period compared to the same period in the previous year, the results were not any better. In contrast, although the number of checks dropped during the project period in both Szeged and Budapest, efficiency did not decrease (and even increased in some respects).

As mentioned above, in Kaposvár a slight (4.7%) increase in the total number of ID checks (24 606 to 25 770) was detected compared to the same period in the previous year. However, the increase in the number of stops did not bring about an increase in follow-up procedures. In fact, there was a 42% drop in the number of persons with outstanding arrest warrants who were identified and taken into custody during the project period (104 to 58), and a 30% decrease in short-term arrests (601 to 408). This again refutes the idea that more ID checks necessarily lead to more tangible results, which is substantiated by our own research results.

In Szeged, while the total number of ID checks dropped by 17.5% (16 724 to 13 786) when compared to the same period in the previous year, overall efficiency actually seems to have increased. Although less petty offense proceedings were initiated (3 036 instead of 3 361) and less fines were imposed on the spot

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if an officer is witness to a breach of law, she needs to establish the identity of the perpetrator in order to impose an on-the-spot fine on the perpetrator or initiate a petty-offense proceeding. In this case the result (the proceeding) is not generated by the ID check (as opposed to the identification of a person subject to an arrest warrant, where the result, the identification and arrest of the person, is the result of the check). It was not possible, however, to distinguish between these two forms of ID checks within the framework of the project, thus all ID checks coming out of petty offense procedures were considered as positive results.

[13] See: Jones–Singer: *op. cit.*

(2 718 as opposed to 3 630), the number of short-term arrests and the number of persons with an outstanding warrant who were identified and taken into custody slightly increased (605 to 611 and 148 to 163, respectively). The Head of the Department for Public Order attributed the increase in the number of wanted persons taken into custody to the setting up of a specialized search unit whose sole purpose is to find and arrest wanted persons. The unit is not using ID checks as a general screening method; instead it applies checks in a strictly targeted manner. This methodology seems to be a much more efficient use of police time and energy, and also creates less tension by inconveniencing fewer people.

As for the 6th District of Budapest, there was a drastic, 75.3% decrease in ID checks compared to the same period in the preceding year (14 362 to 3 538), however, this radical drop in the number of checks did not bring about a similar decrease in the results. During the project's span, 2 242 petty offense proceedings were initiated, as opposed to 977 such measures for the same period in the previous year. In other words, although the number of ID checks dropped by over 50%, more than twice as many checks were followed by petty offense proceedings. The number of short-term arrests remained approximately the same, representing a statistically insignificant increase relative to the same period in the previous year: during the project period, 692 persons were taken into custody, compared to 683 in the same period of the preceding year. The only area where a drastic decrease in the number of checks seems to have resulted in a decrease in effectiveness is the identification of persons subject to an outstanding arrest warrant. During the project period 284 such persons were identified and arrested, as opposed to 317 in the previous year, equivalent to a 10% drop.

In sum, the decrease in the number of ID checks in Szeged and Budapest did not result in a significant decrease in efficiency (there was a decrease in relation to some of the follow-up measures, whereas in relation to other measures, the levels remained the same or even increased). At a minimum, we can conclude that the data does not substantiate a correlation between the number of checks and the measurable success of police work (which is the argument most often used to justify the current practice of extensively checking people).

It is noteworthy that there is significant variation in the rate of efficiency depending upon what ground was recorded as the basis for the ID check.[14]

[14] Since 1 January 2008, under Article 29 of Act XXXIV of 1994 on the Police, a police officer may check the identity of any person whose personal identity needs to be

Most ID checks, 37%, took place during the course of traffic controls. A relatively high proportion of checks, 19%, were based upon the suspicion of a petty offense, 8% of all checks were pursuant to intensive controls, and only 2% of checks were related to the suspicion of a criminal act. ID checks recorded under the "other" category make up a third of all stops; this proportion rises to 50% when we removed traffic control stops from the data. Examining the efficiency rate of the ID checks relative to their different grounds, we see that the most frequently quoted grounds are the least efficient.

Arrests and significant percentages of short term arrests only followed those ID checks that were related to the suspicion of a crime, petty offense or finding a wanted person. Out of these latter cases, however, only those checks that were initiated due to the suspicion of a petty offense made up a substantial portion of all the checks. Overall, traffic control constituted the largest reason for the ID checks, though in 84% of these cases no further action was taken.

Two very important conclusions may be drawn. Firstly, intensive control seems to be very inefficient. As mentioned above, intensive control refers to checks that are not based on an officer's own discretion, but rather upon an order from a superior who defines the permissible parameters. The aim of ID checks under intensive control may be to arrest a criminal suspect, or prevent or frustrate an action or incident posing a threat to public safety. ID checks in

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established. The provision lists the legally permitted aims of the measure: protection of public order, public safety, crime prevention and crime detection, establishing the lawful stay of the concerned person in Hungary, protection of the rights of the person checked and of other natural or legal persons. The concept of "ID checks" covers an extremely wide range of activities, as not only those measures are included which are carried out for the explicit purpose of establishing a person's identity, but almost every single act where an officer comes into direct contact with a citizen. The proportion of such non-autonomous ID checks ranges between 10–30% according to the estimation of police officers participating in the project. Such non-autonomous ID checks are carried out for instance in the course of searching for witnesses. In such cases, ID checks are complementary to other police measures. The vast majority of ID checks, however, are autonomous measures in the sense that they are carried out for the sole purpose of identifying an individual. For example, ID checks can also be carried out in the course of traffic control when the existence of the aims listed above is not a precondition for lawfully applying an ID check. Based on the wording of Article 44 of the Police Act, traffic control can be performed in order to establish whether the driver has a driving license or whether she is in lawful possession of the car, thus in these cases the officer does not need to ascertain suspicion for the stop. Also, under Article 30 of the Police Act, the head of a police unit may order a so called "intensive control" in order to arrest a criminal suspect, or prevent or obstruct a threat to public safety. In such cases, within the defined territory, everyone may be lawfully ID checked even lacking the reasons outlined in Article 29.

such cases are limited to checking persons who are at, or who are entering into a certain area or publicly accessible place. Only 6% of checks performed on the basis of an intensive control order were followed up by any measure. The second area of concern involves ID checks conducted based on the "other" ground, which has an overall hit rate of 9% (0.6% arrest, 2% short term arrest, and 7% petty offense procedure). When asked to provide a specific reason or suspicion for checks falling into this category, many officers failed to articulate any concrete grounds for the check. In 64% of these cases, officers provided no information at all, and in 20% of all the cases the information provided was regarded as unsatisfactory (in a lot of cases, for instance, the officers indicated "general ID check" as the actual reason, which actually amounts to a violation of the Hungarian Police Act, which requires all ID checks to have a specific identifiable purpose). In only 16% of the checks based on the ground "other" did the acting officers provide information that the analysts found acceptable, such as for example "the suspect seemed disturbed when sensing police presence".[15]

Since the majority of the checks (outside traffic control) belonged to the "other" category, it can be concluded that those checks which do not have any particular, specific grounds are at the same time the most inefficient ones with very poor hit rates. This refutes the thesis that it is worth putting police time and work into performing ID checks on a random basis. If we calculate five minutes per ID check on average, the 1.4 million independently initiated checks performed annually (as reported by national police statistics) amount to approximately 233 400 working hours (since regularly not only one, but two police officers carry out the ID checks), adding up to 29 175 working days per year. On the basis of the average monthly salary of police officers (HUF 242 500, approximately 800 Euros gross), this means that the time spent on ID checks is worth over HUF 335 million HUF and 1.1 million Euros annually. With a hit rate of about 20%, the mass use of ID checks seems to be an inefficient use of human and financial resources. [16]

[15] "Acceptable" does not refer to the assessment of whether the reason given is in accordance with the law. Instead, the degree of the specificity or concreteness of the grounds for police action is scrutinized.

[16] A number of officers mentioned raised that when examining the effectiveness of ID checks, it also must be taken into consideration that checks have a general preventive effect, and may in specific cases even be suitable for preventing specific criminal offenses. If, for instance, someone is preparing to commit a burglary, and is stopped and checked by the police, she will most probably give up on the plan, as the fact that the police will know where the given person was at a particular time, significantly increases the chance of being identified. The officers acknowledge that this impact may not be measured as accurately as

3. *The Ethnic Disproportionality of the Stops*

Based on the data collected, it appears that the majority of ID checks take place on public premises (streets, parks and roads account for 78%), while relatively few checks are performed in pubs, discos or similar places (6%). The temporal distribution of the checks is relatively even, with 21% occurring in the morning (from 6 a.m. till noon), 29% in the afternoon (from noon till 6 p.m.), 30% in the evening (from 6 p.m. to 10 p.m.), and the remaining 20% at night.

Police officers stop and check more men than women (75% and 25% respectively), and in line with international trends, young people are more likely to be checked. Individuals belonging to the age group 14–29 represent 43% of all checks, whereas their ratio within the population is 22%.[17] Based on the overall data collected, police in Hungary are most likely to check young men between the ages 14–29.

The data also shows that Roma are disproportionately targeted for ID checks. Disproportionality in ID checks refers to the extent to which police powers are applied to different ethnic/nationality groups out of proportion with their relative ratios in the wider population. The data provides evidence of disproportionality in stops by comparing the rate at which people from different ethnic or nationality groups are stopped in comparison to members of the majority group. Within the framework of the project, 22% of all persons checked by the police were of Roma origin (according to the assessment of the

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the number of follow-up measures (since it is not possible to measure how many offenses were not committed), but they insist that this effect shall be taken into account when we speak about efficiency. It needs to be pointed out that the preventive effect of ID checks has never been measured and proven in Hungary. According to international research on the issue, the potential perpetrator, even after being stopped, will most likely not completely abandon the plan of committing a crime, she will only modify it, change the location or postpone it. A comprehensive British research into stop and search measures established that such police action decreases the number of offenses by only 0.2–2.3%, and no close correlation may be substantiated between the number of checks and the number of those types of offenses that may in theory be influenced by checks. Miller, J.– Bland, N.– Quinton, P.: The Impact of Stops and Searches on Crime and Community. *Police Research Series*, 127, 2000. Also, even if we may presume the existence of a preventive impact of stops in relation to petty theft and trafficking in drugs, it is almost inconceivable in connection with white-collar crime, thus its preventive value only applies to a limited range of criminal activity.

[17] Based on the figures of the 2001 census, see: www.nepszamlalas.hu/hun/kotetek /18/tables/load1_12.html.

officer performing the check), as opposed to 75% being identified as "white."[18] The remaining 3% were identified as "black", "Asian", "Arab" or other. According to reliable sociological research, the estimated proportion of Roma people within the total Hungarian population (of 10 045 000) is approximately 6.2% (i.e. their actual number is around 620 000).[19] Thus, Roma are more than three times more likely to be stopped than their percentage of the general population would indicate.[20]

[18] The results were further refined to remove stops conducted for the purpose of traffic control on the assumption that it is more difficult to make racially grounded distinctions when police officers stop cars on the road. With traffic stops removed, the percentage of Roma is somewhat higher (25%), but the difference is not statistically significant. The reason for this may be that since there are types of cars that are typically driven by Roma, ethnic profiling is not necessarily impossible during traffic stops. Due to lack of reliable data, the attempt to verify whether the type and age of a vehicle may also have influenced the choices of police officers was not successful. However, data provides evidence that such profiling may exist. The examination of the percentages of Roma and non-Roma among those checked during traffic controls show that the percentage of Roma within this sample was 17%. This is below the 22% level of over-representation within the full sample, but still significantly exceeds the national ratio of Roma within Hungary. It also needs to be taken into consideration that car ownership is likely to be rarer among the Roma due to their indigence and marginalized position in society. Thus, while the level of profiling is lower when traffic stops are performed (probably due in part to the fact that it is more difficult to make racial distinctions in such a situation), a certain disproportionality may still be observed. This also explains why the differences between results with and without traffic stops are smaller than previously expected.

[19] Hablicsek, L.–Gyenei, M.–Kemény, I.: *Kísérleti számítások a roma lakosság területi jellemzőinek alakulására és 2021-ig történő előrebecslésére* (Experimental estimates on the territorial dispersion of the Roma population until 2021). 63. See: http://www.nepinfo.hu/index.php?p=605&m=1003 (hereafter: Hablicsek).

[20] There has been some variation among the three pilot sites in terms of disproportionality. In Budapest, one third (33%) of the persons checked were identified as Roma; they were approximately 3.3 times more likely to be stopped and ID checked than non-Roma. Of those who were stopped in Szeged during the project period, 7% were identified as Roma, while, according to the local police chief, the percentage of Roma within the total population of the covered region is only 3%. This means that a Roma person is approximately 2.3 times more likely to be stopped and ID checked than a non-Roma. In Kaposvár, 29% of those ID checked were identified as being of Roma origin, whereas, according to minority community leaders, the percentage of Roma within the total population of the region is 15%. This means that a Roma person is approximately twice as likely to be stopped and ID checked than a non-Roma. The results are worse when we exclude traffic controls from the results: the percentage of Roma among those who were ID checked subsequently rises to 36%; meaning that a Roma is 2.4 times more likely to be stopped and ID checked than a non-Roma.

The results show that Roma youth are especially likely to be targeted for ID checks. The proportion of Roma youth between age 14 and 16 who were stopped and checked during the project period was significantly higher than the already high general representation of Roma within the sample (32% as opposed to 22%). In interpreting the data, we have to take into consideration the fact that the Roma population profile is younger than that of the wider Hungarian population. The age group 15–19, for instance, is estimated to represent 10.3% of the total Roma population, as opposed to 6.4% within the total population.[21]

The data also shows considerable differences regarding the grounds based on which ethnic groups are stopped. It is worth noting that in the category of "other ground" the proportion of Roma is higher (28%) than in the general sample (22%). Disregarding traffic stops, this difference is even bigger, as the proportion of Roma persons in the "other" category increased to 30%. It is obvious that, owing to its lack of concreteness, this is one of those categories under which officers have the most discretion to act on stereotypes, thus the level of over-representation in this category gives rise to serious concerns.

Similarly, the over-representation of Roma among persons ID checked due to the suspicion of a criminal act significantly exceeds their level of over-representation in the general sample. If, however, we look at how efficient these checks are, we can conclude that, despite the commonly held beliefs among officers, it is not more productive to stop and check Roma at greater rates than non-Roma. The data in the research shows that ID checks of Roma are no more likely to yield results than measures enforced in relation to non-Roma. It is often argued that a disproportionate targeting of ethnic minority groups is justified by differential rates of criminal involvement. The hit rate of police checks, however, shows no significant differences by ethnic group. Put simply, if Roma were more likely to be involved in criminal activities then non-Roma, ID checks performed on them would have to lead to follow-up measures more often than the checking of non-Roma.

Roma are disproportionately subjected to ID checks, yet the data shows that they are no more likely to be involved in illegal activities than ethnic Hungarians. On a national level, 78% of ID checks involving Roma were "unsuccessful" in the sense that no further measure was required after the check. For non-Roma this ratio was 79%. The percentage of checks followed by a petty offense proceeding for Roma and non-Roma was 19% and 18%, respectively. Rates of

[21] See Kemény, I.: *A magyarországi cigány népesség demográfiája* (The demography of Hungarian Roma population). http://www. demografia.hu/Demografia/2004_3-4/Kemeny%20Istvan_kozl.pdf

arrests and short-term arrests are practically the same within the Roma and the non-Roma sample.

Furthermore, when ID checks are initiated upon the suspicion of a criminal offense (where in fact the hit rate is rather high), a significantly higher proportion of Roma are stopped without a sufficient ground than non-Roma (37%, as opposed to 25%).It needs to be noted that the country's capital, Budapest: 80% of the checks of Roma did not require any further police action, whereas the same proportion for non-Roma was 59%. If we compare this with the fact that 33% of all the persons checked are of Roma origin (which is a serious over-representation relative to their proportion of 5–10% in Budapest), we can see that the problem is more acute in Budapest than in the other pilot sites.

Research Conclusions

In Hungary, the annual number of ID checks (per 1,000 people) is high when compared with other nations in Europe. The police practice behind this result is based on the conviction that randomly initiated ID checks constitute an efficient crime prevention and detection strategy. However, in the sample, only approximately 20% of the ID checks were followed up by any measure, and of these measures, 18% merely involved the initiation of a petty offense proceeding (i.e. proceedings launched due to transgressions of minor significance). Arrests followed only 1% of the checks in our sample. The research showed that those types of ID checks that are responsible for the majority of the measures (and which are not based on concretely identifiable facts, such as intensive control, traffic control and the as mentioned above illegal "general checks") are the least efficient. The case of the Szeged Police Headquarters is particularly telling: during the project period, the number of ID checks somewhat decreased, while the number wanted and arrested actually increased. Instead of trying to identify and arrest wanted persons by carrying out mass ID checks, the department chose to set up a specialized unit performing targeted checks based on intelligence. This increased efficiency while decreasing the number of checks.

Another important conclusion of the research is that Roma are disproportionately targeted by ID checks. Even though their proportion of the general population is only between 6 and 8%, persons perceived to be of Roma origin by the acting officers constituted 22% of those who were ID checked. The research also refuted the ostensibly rational argument that is frequently presented to justify disproportionality; namely that the Roma are over-represented among offenders, therefore the practice of checking them more often is objectively reasonable. Research results showed that there is no difference in the efficiency

of checks targeting Roma and non-Roma (nationally 22% of the checks on Roma and 21% of checks targeting non-Roma are followed by some further measure). In cases where ID checks were initiated due to the suspicion of a criminal offense, checks performed on non-Roma are, in fact, significantly more efficient: 76% of the stops led to further measures for non-Roma as opposed to 63% for Roma. It can therefore be concluded that the efficiency of disproportionately checking Roma people is a myth and ethnic profiling by the police in Hungary is an existing problem that must be acknowledged.

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Review of "Right to Communicate": Universal Recognition under Trend of Telecommunications Development

Abstract. From a historical perspective, the "right to communicate" is based on human instinct and is also one of the fundamental human rights. The right to communicate relates to the fundamental freedoms and values of contemporary societies and represents the affirmation and expression of the most essential rights for human dignity. With the creation of new technologies of communication such as cellular phones, tele-facsimile and the Internet, it is clear that readily available access to telecommunication is highly important for our daily life. However, due to differences in economic development and resources distribution, there is still a big gap between industrialized and developing countries in access to basic telecommunications. Since everyone should have the equal right to communicate, it is the global aim to assist people living in remote and rural areas to gain basic telecommunications to access and connect with the outer world. The main aim of this article is to examine this innate right as it emerges from historic human rights legal documents and international agreements and to emphasize the equality of rights concerning access to telecommunication between industrialized and developing countries.

Keywords: Right to Communicate, Free Speech, Freedom of Expression, Freedom of Information, Teledensity, Confidentiality and Privacy, Universal Access

I. Introduction

Not only human beings, but also many kinds of animals, have the innate ability to express themselves via sounds, odors, colors, actions, and movements. In this way, their demands, feelings, and opinions can be observed and known by the opposite side–and that is so called "communication". By communication, mankind can understand each other and exchange information actively. Obviously, "communication" itself and related tools play an important role in mankind's

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scientific and civilization history. Nowadays, telecommunications are developing and increasing with high-speed and have become one of the essential components in our daily life. New communication tools such as cellular phones, telefacsimile, and the Internet have changed human's lifestyle and brought to light several legal problems of domestic and international levels.

From historic views, "the right to communicate" is one of human's instinct and also one of their fundamental human rights. The right to communicate, relating to the fundamental freedoms and values of contemporary societies, represents the affirmation and expression of the most essential rights for human dignity.[1] With the creation of new technologies, it is believed that readily available access to telecommunication is so important for our daily life. However, due to the differences of economic development and resources distribution, there is still a big gap between industrialized and developing countries in access to basic telecommunications. Because everyone should have the equal right to communicate, it is the global aim to assist people living in remote and rural areas to gain basic telecommunications to access and connect with the outer world.

The topic of the right to communicate is wide and contains many legal issues such as the history of Free Speech, personal freedoms versus national security, privacy and confidential protection, and the new technology and encryption, etc. In addition to providing a general description of the right to communication, this article will focus on the relationship between the right to communicate and global telecommunication development. As mentioned above, many people still lack the basic telecommunications access such as basic telephone lines to connect the outer world. It is believed everyone has the equal right to communicate, to use public services, and to enjoy the benefits of the new technologies. This is the main issue that will be discussed in this article.

II. The Right to Communicate

1. Introduction

"The right to communicate" contains broad ranges and comprises multitudinous aspects. This right is one of legitimate rights so that human beings could contact and exchange with each other. Many social scientists have long recognized that communication is on the basis of many societies or groups of human beings, and

[1] Trudel, P.: Le role du droit dans les politiques de communication, The Virtual Conference, Overview of Communication Law in the Context of Communication Rights; see http://commposite.uqam.ca/videaz/docs/pitren.html. 1998.

the history of humanity is an inextricably linked with communication.[2] The right to communicate relates to basic individual and collective freedoms, thus this right should be defined as a basic and inalienable human right as the right to food and life. As same as the saying of L. Ron Hubbard, "perhaps the most fundamental right any being is the right to communicate. Without this freedom, other rights deteriorate".[3]

2. *Historic Overviews*

Reviewing the history of human rights, "the right to communicate" can be tracked back to the 18 century. Both "the French Declaration of the Rights of Man and of the Citizen" announced in 1789 and the US Constitution First Amendment entered into force in 1791 mentioned about "free speech" that is considered the early description of the right to communicate.

a) French Declaration of the Rights of Man and of the Citizen (1789)

In August 1789, the French people overthrew the old Empire and pronounced the well-known revolutionary manifesto "Declaration of the Rights of Man and of the Citizen".[4] Article 11 of the Declaration stated, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law." In the Declaration, it recognized that "the right to communicate" is one of the most precious rights of human beings and such right was defined as free communication of ideas and opinions. Under the Declaration, people had such freedoms to speak, write and print. By speaking, writing and printing, people can express their ideas and opinions and communicate with each other in ways that corresponded to the meaning of free communication. Obviously, Article 11 of the Declaration contains certain principles of fundamental human rights including free speech, freedom of press, freedom of expression and freedom of information. Under this Declaration, the right to communicate and free speech were not unlimited and unrestricted. On the contrary, abuses of such rights and

[2] ITU: Proposal to establish an ACC inter-agency project on universal access to basic communication and communication and information services. p3.

[3] See http://www.freedommag.org/25thanni/express.htm.

[4] Lewis, G.: The People' and the French Revolution (The French Revolution, 1787–1799). http://www.warwick.ac.uk/fac/arts/History/teaching/french-rev/people.html

freedoms were prohibited by this Declaration and should be defined by laws, and people shall be responsible for their opinions and ideas.

At that moment, the Declaration was linked to the political issues. During the monarchic and autocratic period, French people were not allowed to hold anti-government opinions and would be punished for exchanges of prohibited information. Dissatisfied with such a condition, people struggled for more freedoms and rights. Some historians thought the Declaration had great influences on political thoughts, and several constitutional declarations of European states in the 19th century such as the Constitution of the Weimar Republic of Germany.[5] Many scholars recognized the Declaration as a product of the Age of Enlightenment. The Declaration was very important not only because it established some doctrines of basic human rights at its earliest historic status, but it also brought the new ideas for modern democracy. It also stressed a reasonable and legal basis of rights and freedoms that was defined under Article 4. It stated that "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."

b) US Constitution First Amendment and Free Speech (1791)

As in France, US Congress also passed the Constitution Amendments, known as "Bill of Rights" in September 1789 and entered in force in 1791. The US Constitution First Amendment states "Congress shall make no law respecting ... or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." With First Amendment, several basic human rights were raised and protected: such as free speech, freedom of press, freedom of religious, right to assemble, and right to petition. Unlike French Declaration, the First Amendment does not mention the restriction and limitation of free speech and freedom of press. In other words, at the time Congress passed the First Amendment it basically did not limit or abridge free speech. Free speech is absolutely protected in the US Constitution, and it was delivered by the framers and had been preciously guarded.[6] At the beginning, many people strongly advocated that freedom of speech enshrines, more than any other freedom, the liberty of the individual and it is manifest in the constitutional protection under the First

[5] See http://funkandwagnalls.com/encyclopedia/low/articles/d/d00600326f.html.

[6] Kairys, D.: The History and Current Retrenchment of Free Speech. *Political and Civil Rights Law Review*, 73 (1994).

Amendment[7] and rooted in natural law.[8] However, some scholars have criticized that the right of free speech should be accompanied by a responsibility[9] and it is an important part to protect the right in a constitutional democracy.[10]

Under the First Amendment, freedom of speech is no doubt the first freedom mentioned. However, the rights of First Amendment historically have come under huge pressures. During the Red Scare of the early 1920s, many people were deported for their political views.[11] At the time of McCarthy period, the infamous blacklist ruined lives and careers.[12] Until now, the creators, producers and distributors of popular culture are still being blamed for causing social problems in the United States. At the early establishment of US, most courts usually ignored the First Amendment rights of political minorities and free speech issues did not even reach the Supreme Court. Until 1919, the Supreme Court unanimously upheld the conviction of a Socialist Party member for mailing anti-war leaflets to draft-age men.[13] A few months later, in the case of *Abrams v. US,*[14] the defendant's conviction under the Espionage Act for distributing anti-war leaflets was upheld, but two dissenting opinions were formed and deeply influenced current applications of the First Amendment. Two Justices, Oliver Wendell Holmes and Louis D. Brandeis, argued speech could only be punished if it presented "a clear and present danger" of imminent harm. Ultimately, these justices were able to convince a majority of the Court to adopt the "clear and present danger test".

Nevertheless, until the 1950s, the Supreme Court still held the opinion that speakers could be punished if they advocated overthrowing the government

[7] Gunther, G.: Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History. *Stanford Law Review,* 27 (1975) 719.

[8] Thomas, C.: The Highter Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment. *Harvard Journal of Law and Public Policy,* 12 (1989) 63; also see Hamburger, Ph. A.: Natural Rights, Natural Law, and American Constitution. *Yale Law Journal,* 102 (1993) 907.

[9] Trakman, L. E.: Transforming Free Speech: Rights and Responsibilities. *Ohio State Law Journal,* 56 (1995) 899.

[10] See Chafee, Z.: Freedom of Speech in War Time. *Harvard Law Review,* 32 (1919) 932.

[11] See http://www.scsd.k12.ny.us/alex/coldwar/redscare.htm

[12] See http://www.scsd.k12.ny.us/alex/coldwar/hunt.htm

[13] See *Schenck v. U.S.*, 249 U.S. 47 (1919); *Baer v. Same*, Nos. 437- 438, decided on March 3, 1919. Also see http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=249&invol=47

[14] See *Abrams v. US*, 250 U.S. 616 (1919), *Abrams et al. v. United States*, No. 316, decided on Nov. 10, 1919. Also see http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=250&invol=616

even if the danger of such an occurrence were both slight and remote. This recognition seriously weakened the "clear and present danger" test and many political activists were prosecuted and jailed simply for advocating communist revolution. On the other hand, loyalty oath requirements for government employees were upheld and thousands of Americans lost their jobs merely based on flimsy evidence supplied by secret witnesses.[15] Finally, in 1969, in the case of *Brandenberg v. Ohio*, the Supreme Court struck down the conviction of a Ku Klux Klan member and established a new standard to apply. The new standard set up that speech could be suppressed only if it is intended, and likely to produce, "imminent lawless action". Otherwise, even speech that advocates violence is protected. The Brandenberg standard still prevails even now.[16] The First Amendment exists precisely to protect even the most offensive and controversial speech from governmental suppression. By imposing "time, place and manner" restrictions, government can limit some protected speech. It is mostly commonly done by requiring permits for meetings, rallies and demonstrations. However, a permit cannot be unreasonably withheld, nor can it be denied based on content of the speech. That will constitute "discrimination" and is also unconstitutional. Therefore, the best way to counter obnoxious speech is opening more speech, by persuasion, not coercion.[17]

3. *Review of Some International Agreements*

Although the declarations and legislation concerning the right to communicate had been established at its earliest time in many industrialized countries, numerous developing countries and remote areas in the world still lack related announcements and standards. Because the right to communicate is rooted by a natural instinct of mankind, a general and wide-based agreement should be agreed to promote into the international community. With regard to the right to communicate, proclamations are set by Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, and several UNESCO Resolutions.

[15] See http://comm1.uwsp.edu/121/lectures/1stamen/tsld012.htm

[16] See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), Appeal from the Supreme Court of Ohio, No. 492, Also see http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=395&invol=444 and http://comm1.uwsp.edu/121/lectures/1stamen/tsld013.htm

[17] See http://www.aclu.org/issues/freespeech/isfs.html

a) Universal Declaration of Human Rights

On Dec. 10, 1948 the General Assembly of UN proclaimed the Universal Declaration of Human Rights.[18] Article 19 of the Declaration states "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19 of Universal Declaration is clearer than French Declaration and the First Amendment concerning the definition of the right to communicate. Under Article 19 of Universal Declaration, the right to communicate includes freedom of opinion, freedom of expression, and freedom of information that have been protected.

Considering phraseology, speaking is one kind of expression of human beings. Not only speaking, but also writing, printing and acting should be protected. Those protections are within the scope of freedom of expression. Moreover, expression is only a single side of "communication", and the other side is the role of receiver, listener, and reader. Including freedom of information that contains free seek, free receive, free impart information, the right to communicate can be well established. Also, those rights and freedoms should be "without interference" and "through any media and regardless of frontiers". Considering rapid changes of telecommunications, these two provisions correspond to the requirement of the modern information society.

In addition, Article 21 (2) states "Everyone has the right of equal access to public service in his country." The "service" mentioned here should include "universal service" defined thereafter as everyone's equal right to use basic telecommunication tools to connect the outer world. Article 2 of Universal Declaration also states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." Thus the right to communicate is already recognized as a legalized and fundamental right under international law.

b) International Covenant on Civil and Political Rights

Article 19 of International Covenant on Civil and Political Rights:[19]

1. Everyone shall have the right to hold opinions without interference.

[18] UN General Assembly Resolution 217 A (III), Dec. 10, 1948; see http://www.un.org/Overview/rights.html

[19] U.N.T.S. No. 14668, vol 999 (1976), p. 171; see http:www.tufts.edu/departments/fletcher/multi/texts/BH498.text

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and idea of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with its special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights of reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.

Basically, Article 19 of International Covenant on Civil and Political Rights advocates free expression and free information defined under Universal Declaration. The difference between them is International Covenant regulates the restriction and limitation of such rights in Article 19 (3). It stresses the exercise of such rights should accompany with "special duties and responsibilities". Under Article 19 (3), freedom of expression and freedom of information should not be "absolutely protected" and should have some "demarcation lines".

To maintain the interests of the public and to limit the abuses of personal rights, several exceptions of freedom of expression and information are regulated under International Covenant including (1) respect other peoples' rights, (2) respect other peoples' reputations, (3) national security, (4) public order, (5) public health; and (6) public morals. It is a dilemma to balance interests between personal rights and public order. Any unbalanced action between them will cause either abuses of personal rights or excess of governmental power. Hence, how to establish the "demarcation lines" and to confirm the "special duties and responsibilities" should be well established and clearly defined. Article 19 (3) provides two measures: "legal basis" and "necessary" to set up the standard of reasonable personal freedoms and rights. Out of the "demarcation lines", such freedoms will be considered as abuses of rights and will not be protected by law.

c) Convention on the International Right of Correction

Unlike Universal Declaration and International Covenant, the goal of the Convention on the International Correction likely focuses on the freedom of press. Nevertheless, from several articles of the Convention, the tracks of freedom of expression and freedom of information can be found. Article 11 of Convention on the International of Correction states "Recognizing that the professional responsibility of correspondents and information and information agencies requires them to report facts without discrimination and in their proper context

and thereby to promote respect for human rights and fundamental freedoms, to further international understanding and cooperation and to contribute to the maintenance of international peace and security, Considering also that, as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been to be false or distorted, follow the customary practice of transmitting through the same channels, or publishing corrections of such dispatches,..."[20]

d) Some Resolutions of UNESCO (United Nation Educational, Scientific, and Cultural Organization)

The Constitution of UESCO stresses the need for information and communication within and between states. In accordance with the provisions of Article I.2 (a) of the UNESCO's Constitution, it regulates "the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image". Since 1945, UNESCO has set up its action plans in the field of communication and information for decades to "promote the free flow of ideas by word and image". The purpose is to prevent wars and construct the defense of peace by "advancing the mutual knowledge and understanding of people" in spite of the "ignorance of each other's way and lives, suspicion and mistrust between the peoples of the world".[21] Within UNESCO Resolution 3.2 of 1983, and UNSCO Resolution 4.1 of 1991 on the Right to Communicate,[22] and the 1991 UNESCO Declaration of Windhoek, "the right to communicate" and freedom of information also had been reaffirmed to participant countries concerned and is expected to reduce disparities in information flow between developed and developing countries, international and national levels as well as the public and private sectors.

III. Applications and Restrictions of the Right to Communicate

"The right to communicate" is linked to several fundamental human rights such as freedom of speech, freedom of expression, freedom of information, and media rights, etc. From several historic declarations and international agreements, the

[20] Convention on the International Right of Correction, 435 U.N.T.S. 191, entered into force Aug. 24, 1962; see http://www1.umn.edu/humants/instree/u1circ.htm

[21] See http://www.unesco.org/webworld/unesco_policies.html

[22] See http://rrr.dds.nl/pcc/nl/annexe.html

right to communicate has been affirmed. To balance personal rights and public interests, some restrictions and limitations should be poured into considered within the scope of "the right to communicate". Thus, how to protect personal rights relating to the right to communicate and properly safeguard access to information services concerning privacy and national security is an important issue. Following the creation of new technologies and the Communication Revolution, some new problems concerning the intellectual property right, encryption and privacy have been raised.

1. Freedom of Expression

As mentioned above, freedom of expression is affirmed both in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Both of them state that everyone has freedom of opinion, freedom of expression, and freedom to hold opinions without interference. The right to express one's thoughts and to communicate freely each other affirms the dignity and worth of every member of societies, and allows each individual to realize his or her full human potential. Thus free expression is an end in itself and as such, deserves society's greatest protection.[23]

In the US, the purported basis of the doctrine of freedom of expression is the First Amendment.[24] Under the First Amendment, the protection of free speech is not limited to "pure speech" such as books, newspapers, leaflets, and rallies. It also protects "symbolic speech" like nonverbal expression whose purpose is to communicate ideas. The word "speech" under the First Amendment has been extended to a generous sense of "expression" including verbal, non-verbal, visual, and symbolic. In 1969, in the case of *Tinker v. Des Moines*, the Court recognized the right of public school students to wear black armbands in protest of the Vietnam War. The wearing of armbands with a peace symbol was protected as symbolic speech protected under the First Amendment.[25] Later on, in the case of *Texas v. Johnson* of 1989[26] and *U.S. v. Eichman* of

[23] See http://www.aclu.org/library/pbp10.html

[24] Perry, M. J.: Freedom of Expression: An Essay on Theory and Doctrine. *Northwestern University Law Review*, 78 (1983) 1137.

[25] See *Tinker v. Des Moines School District*, 393 U.S. 503, (1969).

[26] See *Texas v. Johnson*, 491 U.S. 397, (1989), Certiorari to the Court of Criminal Appeals of Texas, No. 88-155. Also see http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=491&invol=397

1990, the Court struck down government bans on "flag desecration".[27] Other examples of protected symbolic speech include works of art, T-shirt, slogans, political buttons, music lyrics and theatrical performances. Protected expression now includes such non-verbal expressions as wearing a symbol on one's clothing, dance movements, or a silent candlelight vigil. Recently, Justice David Souter listed some of the forms of expressions protected under the First Amendment that have been recognized by the US Supreme Court such as painting, music, poetry, motion pictures, dramatic works, radio and television entertainment, drawings, and engravings.[28]

The English philosopher *John Stuart Mill* (1806–1873) articulated what might be called the "liberal" or (better) the "libertarian" position on freedom of expression in his 1859 book *"On Liberty"*.[29] His test for appropriate government interference with human liberties is his well-known "harm" principle.[30] This basic principle provides an excellent rule-of-thumb for approaching issues of freedom of expression. Most of the classic exceptions to freedom of expression, as established by the US Supreme Court, are consistent with this harm principle. Contemporary philosophers like Joel Feinberg[31] and Carl Cohen[32] following Mill's approach have summarized the exceptions to freedom of expression established by the US Supreme Court. Critics of Mill's approach to freedom of expression generally accept the harm principle as a justification for suppressing speech, but claim that additional reasons are sufficient to suppress speech. For example, Patrick Devlin and Edmund Pincoffs believed that the government should enforce morality and should legislate morality, suppressing

[27] See *United States v. Eichman*, 496 U.S. 310, (1990), Appeal from the District Court for the DC, No. 89–1433. Also see http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=496&invol=310

[28] See *NEA v. Finley*, No. 97–371, (1998).

[29] J.S. Mill (1956), On Liberty, Currin V. Shields, ed., New York: Macmillan Publishing Company, originally published 1859. Also see http://wiretap.spies.com/ftp.items/Library/Classic/liberty.jsm

[30] *Ibid.*, see Chapter 1, *Introductory*: "... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant"; 13.

[31] Feinberg, J.: Limits to the Free Expression of Opinion. In: Feinberg, J.–Gross, H. (ed.): *Philosophy of Law*. Belmont, California, 1995.

[32] Cohen, C.: Free Speech and Political Extremism: How Nasty Are We Free to Be? 1992. *Law and Philosophy* (1989) 263–279. Adams, D. M. (ed.): *Philosophical Problems in the Law*. Belmont, California, 257–265.

speech to further that goal.[33] Until now, many *exceptions concerning free expression* have been decided by the courts, including defamation,[34] sedition,[35] breach of the peace, incitement to crime, "fighting words",[36] causing panic,[37] and obscenity.[38] Thus the right to freedom of expression is restricted when expressions cause harm to another person.

2. *Freedom of Information*

Similar to freedom of expression, freedom of information is also endorsed both in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Meanwhile, freedom of information comprises freedom to seek, receive, and impart all kinds of information and ideas without interference. The right to communicate contains the right to free access to the essential services through the right to the use of information. The right of access to information through communication tools should be applied without restrictions at both individual and collective levels. The right to communicate concludes both the right to inform and the right to be informed.

[33] Pincoffs, E.: *"The Enforcement of Morality", from Philosophy of Law: A Brief Introduction.* Belmont, California, 1991. 131–141; Devlin, P.: *The Enforcement of Morals.* Oxford, 1965.

[34] See *Wojnarowicz v. American Family Association*, 745 F.Supp. 130, S.D.N.Y. (1990).

[35] Although not without controversy, the U.S. Supreme Court has upheld statutes that prohibit the advocacy of unlawful conduct against the government or the violent overthrow of the government. As with prohibitions discussed earlier, the expressions in question are assessed according to the circumstances. Academic discussion of the theories of, say *Karl Marx* presumably would not be prohibited under such a test, especially in this post-Soviet era. The theoretical consideration and even endorsement of these views could not remotely be considered to be reasonable expectations of the actual overthrow of the government. But it is possible that an artist might develop a project, perhaps guerrilla theater or an exhibit that urged the destruction of the United States (the "Great Satan") by extremist religious groups. The likelihood of success by the latter group would seem as improbable as the likelihood of success by contemporary Marxists. See http://www.csulb.edu/~jvancamp/intro.html

[36] See *Chaplinsky v. New Hampshire*, 315 U.S. 568–572, (1942). The U.S. Supreme Court held that the First Amendment does not protect "fighting words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

[37] See *Schenck v. United States*, 249 U.S. 47, (1919). This classic exception is credited to Justice Oliver Wendell Holmes: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

[38] See *Miller v. California*, 413 U.S. 14, (1973). The U.S. Supreme Court established a three-pronged test for obscenity prohibitions that would not violate the First Amendment.

In the US, the federal and state governments have enacted laws concerning freedom of information that guarantee the right of the public access to governmental documents. The federal Freedom of Information Act (FOIA) was passed by US Congress in 1966 and amended in 1974. The FOIA creates procedures whereby citizens may obtain the governmental agencies' records. Also, the federal Electronic Freedom of Information Act Amendments of 1996 mandated that the federal government's electronic records are public to the same extent as their paper counterparts.[39] Although US Supreme Court has recognized the First Amendment right of access to governmental records in some limited situations, and a few states have enshrined a right of access in their state constitutions, statutes and the common law are more frequently invoked to create a presumption of openness.[40]

The FOIA directs government agencies to disclose certain types of records and describes the manner of disclosure required.[41] Under FOIA, some records that must be published in the Federal Register include description of the agency's organizational structure, description of the procedures that are set up to give the public access to the agency records, general description of how the agency functions and its decision-making process, the agency's rules of procedure, and the agency's general policies.[42] Some records that must be made available for public inspection and copying include final decisions in particular administrative cases, policy statements that the agency uses but has not published in the federal register, internal manuals written for the agency's staff that affect members of the public, and an index of the kinds of information that must be made public.[43] Besides, Courts have reserved the right to interpret provisions broadly to achieve the goal of Congress of full disclosure.[44]

Although the goal of FOIA is full disclosure of governmental records, US Congress concluded that some confidentiality is necessary for governments' administrative goal. The federal agency can refuse to release certain types of information. There are nine legal categories that are exempted under the law of the FOIA including national security, internal agency rules, governed by other statutes, business information, internal government memos, private matters, law enforcement investigations, regulation of financial institutions, and information

[39] http://www.rcfp.org/handbook/viewpage.cgi?0901

[40] See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Montana, New Hampshire, North Dakota and Tennessee are among those states whose constitutions recognize a right of access to government documents.

[41] See Freedom of Information Act (FOIA) Section 552 (a).

[42] See FOIA Subsection (a) (1) lists.

[43] See FOIA Subsection (a) (2) lists.

[44] See FOIA Subsection (1) (3).

concerning oil well locations.[45] The FOIA requires an agency to provide a "reasonably segregation" portion of a record and cannot withhold an entire document merely because some portions of the document are exempt. The exemptions of FOIA are not mandatory, but discretionary. That means an agency can choose to release records even after it has determined the records fall within one or more of the above exemptions. In most states, there are only a few specifically designated types of records that are required to be kept secret.

3. Public Order and National Security

Article 19 of International Covenant on Civil and Political Rights states that the exercise about "the right to communicate" may be subjected to certain restrictions, but those restrictions shall provide by laws and are necessary for the protections of national security or of public order. In the name of national security, many governments have frequently used it as a pretext to violate fundamental human rights and civil liberties. For example, the US government had historically overused the concept of "national security" to shield itself from criticism, and to discourage public discussion of controversial policies or decisions. In the US history, President Jefferson countenanced internment camps for political dissidents; President Wilson authorized the round up and deportation of many foreign-born suspected "radicals" during the Palmer Raids,[46] and President Franklin Roosevelt interned Japanese Americans in World War II. During the period of Cold War, the US government also adopted some measures against free speech such as loyalty oaths, blacklisting and travel restrictions.

Additionally, the US government attempted to censor the "Pentagon Papers" in the Vietnam War era.[47] In 1971, the New York Times Corporation published and disclosed the "Pentagon Papers"[48] to the public, and that caused the conflicting claims between the rights of the First Amendment and national security. Meanwhile, the New York Times ignored the government's ban to cease publication; and the US government then took juridical actions against the company and the stage was set for a Supreme Court decision. The Supreme Court had ruled that the government could not, through "prior restraint", obstruct publication of any material unless it could prove that it would surely

[45] See FOIA Section 552(b).

[46] See http://chnm.gmu.edu/courses/hist409/red.html

[47] See http://www.aclu.org/issues/security/isns.html

[48] The Pentagon Papers is a secret history and analysis of the US's involvement in Vietnam and the contents are some classified studies that entitled "History of U.S. Decision-Making Process on Viet Nam Policy."

result in "direct, immediate, and irreparable harm" to the nation. The US government failed to prove and the public was given access to vital information.[49]

The US Supreme Court has recognized the governmental interest to keep some information secret such as wartime troop deployments. The Court has never actually upheld an injunction against speech on national security grounds.[50] As the Pentagon Papers case shows, the government's claims of "national security" must always be closely scrutinized to make sure they are valid.[51] Besides, "national security" is also one of the legal exemption categories that limit the public's right of free information in USA. Under FOIA, it regulates if showing governmental records would reasonably expect to cause damages to "national security", government agencies can refuse to disclose records. Those include military plans, weapons, scientific and technology data that relate to national security, and CIA records.[52]

Due to national security and public order, most governments reserve the right to limit and restrict citizens' exertion in free expression and free information in order to achieve higher national interests and administrative goals. In other words, freedom of expression and freedom of information basically are not unlimited and should be regulated to avoid the damages of national and public interests. On the other hand, the rights to know and to communicate are essential in modern democratic systems and should not be violated arbitrarily by the name of national security or public order. Therefore, it is necessary to define the detailed scope of the free expression and free information by laws and due process.

4. Confidentiality and Privacy

Confidentiality and the right of privacy should be taken into consideration within the scope of the right to communicate. Through the new telecommunication technologies created, personal information and data are more easily available and could be unjustly obtained by anyone than ever before. It is possible to collect and gather personal information and computer data through new telecommunication tools such as telephone wiretaps, photographic and video cameras, microphones and amplifiers, as well as the Internet. Unlike many

[49] See *New York Times Co. v. United States*, 403 U.S. 713 (1971), Certiorari to the United States Court of Appeals for The Second Circuit No. 1873. Also see http://caselaw.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=403&page=713

[50] *Ibid.*

[51] See http://www.aclu.org/library/pbp10.html

[52] See FOIA Section 552(b).

legal concepts, the right of privacy has only recently recognized by law and still continues to establish its legal basis.[53] Following the introduction of the new technology such as telephones, telefacsimiles, and other many electronic telecommunication tools, the legal recognition of privacy as a fundamental right has been gradually established.[54] Some articles and judicial decisions believe privacy is accompanied by the right "to be let alone".[55]

In the US, the law regulates that people should be protected by privacy when they "believe that the conversation is private and can not be heard by others who are acting in an lawful manner".[56] People have the right of privacy for contents of mail envelopes, telephone conversations, telegraphic messages, and electronic data by wire.[57] Additionally, confidential personal information such as contents of email in public system, bank records, library records, and student records is also considered as one kind of personal privacies and should be protected.[58] The right of privacy is also linked to some professional ethics, such as confidentiality of disclosures between attorney and client, physician and patient, as well as priest and penitent. Violations of such confidentiality will constitute a form of tort.[59]

Based on this recognition, people not only own the basic right to communicate but also their communications should be protected, not unjustly or illegal occupied. As the Fourth Amendment states "The right of people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated..." There are many pending cases and petitionary activities concerning protections of the privacy of personal computer files and communications by using the encryption technology. Encryption is a technology that encodes computer file and communications, much like a combination lock secures a filing cabinet.[60] Certainly, the government has this duty to secure citizen's privacy by adopting laws and regulations to protect its people against

[53] Warren and Brandeis: The Right to Privacy. *Harvard Law Reviev*, 4 (1890) 193; Prosser: Privacy. *California Law Review*, 48 (1960) 383, and the Second Restatement of Torts § 652A–§ 652I.

[54] Standler, R. B.: *Privacy Law in the USA*. see http://www.rbs2.com/privacy.htm. 1997.

[55] *Ibid.*; also see Cooley, T. M.: *A Treatise on the Law of Torts* (1888) 29, 2d ed.; *Wheaton v. Peters* (1834) 33 US 591. 634 and Olmstead v. US (1928) 277 US 438. 478.

[56] American Jurisprudence, (1974). Telecommunications § 209.

[57] See Ronald; 18 USC § 2510 et seq.; 18 USC § 1702; 39 USC § 3623.

[58] See Ronald; also see 18 USC § 2702(a); 12 USC § 3401; 20 USC § 1232g.; NY CPLR § 4509.

[59] Humphers v. First Interstate Bank of Orgeon (1985): 696 P. 2d 527

[60] Americans for Computer Privacy: US Policy on Encryption Should Protect Our Right to Privacy; see http://www.computerprivacy.org/about/.

invasion of their information and data. The government should formulate related policies controlling the use of electronic recording of personal information and data for privacy protection. The governments also should enact laws and regulations to protect the interests of users, creators, producers and distributors. Only through legislative protections, the true meaning of the right to communicate can be achieved.

IV. Universal Access and Global Telecommunication Development

1. Scopes of Universal Access and Services

Universal service is defined as a telephone in every household and universal access is defined as being within easy reach of a telephone.[61] Universal access to basic telecommunications has already been emphasized for decades in the 20th century. To make universal access affordable enough to address everyone's basic right to communicate gradually plays a vital role in international telecommunication cooperation. For most developing countries, universal access is more relevant than universal service. The policy of universal access has been drawn through provisions of public telephones, at least installing one public telephone in every village. Although the cost of providing telecommunication services in rural areas is quite high, the impacts on cultural, social, educational, and economic development are obvious and considerable.[62] A large portion of populations of developing countries lives in rural areas, and those areas are often lacking communication tools to connect with the outside world. Making telecommunication and information accessible and available is essential and important for them. In other words, achieving universal access and services not only realizes everyone's basic right to communicate, but also has a great influence to the right to know, right to print, right to education, etc.

2. Teledensity–the Differences of Telecommunication Development between Industrialized and Developing Countries

There is a big gap between industrialized and developing countries in teledensity. The most common measure of telecommunication access is teledensity, the

[61] BDT: Asia and Pacific Telecommunication Trade and Finance Colloquium, New Delhi, India, Nov. 3–5, 1997; see http://www.itu.int/ITU-D-Finance/finance/Conclusions/asia.htm; 4.

[62] *Ibid.*

number of main telephone lines per 100 inhabitants. In the richest countries, there are 45 or more phone lines for each 100 people; however, there is less than one in the poorest countries mainly in sub-Saharan Africa. Many developing countries in Asia, Latin America, and Eastern Europe are somewhere in between.[63] The gap between industrialized and developing countries, the "information haves" and "information have nots" lasts for many years and continues to increase. Compared to all people in the world, the inhabitants that belong to "information haves" merely make up a very small proportion, and the major population in developing countries still belongs to "information have nots" that even do not even have the basic telecommunication tool–the telephone–in their daily life. For example, sub-Saharan Africa has fewer telephone lines than the city of Tokyo, while about 12 million telephone lines serve more than 700 million Africans. The biggest challenge for African countries is how to overcome the limited finance available for infrastructure provisions.[64] The big gaps existing between industrialized and developing countries relate to distribution of access, resources, and opportunities in the information and communication fields. Thus, it is extremely important to heighten the teledensity in remote areas.

People living in the industrialized countries have easier access to telecommunications than those in developing countries. In many developing countries, it is estimated probably more half of the population has no access to even simple telecommunication services such as telephones and telegraphs.[65] This is one kind of poverty, information poverty that appears in many lower-developing countries. Many developing countries, especially the least developed countries are not sharing the benefits of the communication revolution. Many of them lack financial support, suitable policies, technical skill, and trained manpower to develop, maintain and provide the basic telecommunications service. The telecommunication infrastructure is really fragile in most developing countries. The lowest-income countries that account for about 56% of the world's population share only 7% of the world's telephone mainlines. Excluding China (PRC) and India, a total of 57 lowest-income countries that account for one-fifth of the world's population has only one-hundredth of the global telephone mainline.[66] Additionally, those lines are limited to major cities, the waiting lists for basic

[63] ITU: Inter-Agency Project on Universal Access to Basic Communication and Information Services, see http://itu.int/acc/rtc/acctref/acctref.htm

[64] Agence France-Rresse, (May 4, 1998): Mandela says business must fuel Africa's information age; Johannesburg.

[65] See the ITU report.

[66] ITU: ACC Statement on Universal Access to Basic Communication and Information Service; see http://www.itu.int/acc/rtc/acc-rep.htm.

telecommunication tools are still long, and there is no indication showing that the situation will improve soon. Without basic telecommunication services, information and knowledge cannot easily reach these areas and will impair their fundamental human rights concerning the rights to plant, shelter, health, medicine, education and development.

For developing countries, basic telecommunication development also brings problematic issues including nationwide availability, non-discriminatory access and widespread affordability. Considering economic, social, geographic, local demand, a telephone should be within a reasonable distance for everyone. The distance depends on the coverage of the telephone network, the geography of the country, and the density of the population and the spread of habitations in the urban and rural areas. It also can reflect the different policies such as providing a telephone to every village.[67] On the other hand, in industrialized countries, universal access is considered elementarily achieved, that the majority of the population already has the basic telecommunication - telephone in use.[68] The goals of developed countries will gradually focus on telecommunication market liberalization, higher quality, and more advanced telecommunication tools introduced such as cellular phones, pagers, the Internet, and satellite connections, etc. The poor telecommunication infrastructure in developing countries will also impact the telecommunication development and its accessibility in industrialized countries. Due to lacking of basic and reachable telecommunications, the people living in developing countries cannot connect with people living in industrialized ones, to know their cultures, and to promote future cooperation in telecommunications. The mutual understanding and assistance between developing and industrialized countries are necessary for global peace and development. Therefore, developed countries have the obligations to assist telecommunications-lacking countries and decrease the gap in teledensity.

3. Role of International Telecommunication Union (ITU)

Founded in 1865, the former ITU, the International Telegraph Convention was operated for solving problems of messages transmitted and transcribed across two or more countries caused by the different telecommunication systems. After the mid-20th century, following the participation of more and more developing countries into the ITU, the missions of ITU have been broadened from inter-

[67] See ITU: World Telecommunication Development Report (March 1998); 4 th edition, also see http://www.itu.int/ti/publications/WTDR.98/index.htm.

[68] *Ibid.*

national telecommunication cooperation to telecommunication developmental assistance for developing countries.

a) The Constitution of ITU and the Right to Communicate

Providing technical assistance to developing countries in order to make telecommunications available universally is one of important missions of ITU. Under Article 1.1 (b) of the Constitution of ITU, the ITU should "promote and offer technical assistance to developing countries in the field of telecommunications..." It is one of major purposes of ITU to reduce the differences and distances of teledensity between industrialized and developing countries. Article 1.1 (c) states the ITU should "promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services... so far as possible *generally available to the public.*" Also, Article 1.1 (d) states the ITU should "promote the extension of the benefits of the new telecommunication technologies *to all the world's inhabitants.*" Obviously, the ITU stresses telecommunications should be available to the public and everyone should enjoy the benefits of the new telecommunications. In addition, the ITU promotes everyone's equal right to telecommunication. Under Article 33, every state should "recognize *the right of the public to correspond* by means of the international service of public correspondence. The services, the charges and the safeguards shall be *the same for all users* in each category of correspondence *without any priority or preference.*" The ITU also reserves the right to each state to stop or cut off telecommunications services due to national security, public order, and domestic legal requirement and decency.[69]

b) Efforts of ITU in Global Telecommunication Development

For many years, the ITU has promoted the right to communicate as a basic human right. Under the aegis of UN's Administrative Committee on Coordination, a project is under implementation on Universal Access to Basic Communication and Information Service. The project is designed to reduce the information gap between the developed and developing countries and make telecommunication and information services accessible easily. In 1984, the Maitland Commission recommended that by the year of 2000 everyone in the

[69] See Article 34.1 of the Constitution of the ITU: "Member reserve the right to stop the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency..."

world should have ready access to at least basic telephone service. This goal has not yet been reached; however, access to basic telephone services for the inhabitants in low-developing countries is rapidly increasing.[70] An inter-agency UN project on universal access to basic communication and information service–"the right to communicate"–was created at the initiative of Dr. Pekka Tajanne, former Secretary-General of ITU.[71]

At the beginning of the new millennium, the duty of ITU is to make telecommunications available to all of the world's inhabitants, at prices that are affordable to all. In addition, to strengthen the multilateral foundations of international telecommunications and to promote universal access and global connectivity should quickly be embarked.[72] With the pilot and support of ITU, there are several Action Plan Programs planned and proceeding such as the Buenos Aires Action Plan and the Valetta Action Plan Program, etc. In 1998, the ITU held the World Telecommunication Development Conference in Malta and 143 participatory countries adopted the Valletta Declaration and Action Plan.[73] The Valletta Declaration underlines the importance of translating the indisputable potential of telecommunications into tangible results to improve the lives of all people of the world, especially those in developing countries.[74]

The ITU encourages and supports universal service, global access and fair pricing and give special attention to the least developed countries. Those actions and programs are designed to develop best-practice, sustainable and replicable models of ways to provide access to modern telecommunication facilities and information services, especially to people living in rural and remote areas. The final goal of those programs and plans is universally accessible telecommunications to the whole of humanity. In the prevailing environments of converging technologies and globalization, it is the time to structure the telecommunication sector in order to stimulate public and private sectors' investments and accelerate the pace of expansion and modernization of telecommunication networks in developing countries. To the end, it will benefit everyone to provide basic telecommunication services and assist necessary technical skills in rural and remote areas.

[70] ITU: Proposal to Establish an ACC Inter-Agency Project on Universal Access to Basic Communication and Information Services; see http://www.itu.int/acc/rtc/acctor1.htm

[71] "The Right to Communication: A New Declaration is Born." ITU News, 1997. No. 6; see http://www.itu.int/acc/rtc/acc-rep.htm

[72] H. I. Toure (Director of Telecommunication Development Bureau of the ITU): BDT Director Message, see http://www.itu.int/ITU-D/bdtint/Director /messdir.htm

[73] M2 Presswire (Apr. 20, 1998): ITU: ITU World Telecommunication Development Conference adopts Valletta Action Plan, Valletta, Malta.

[74] *Ibid.*

V. Conclusion

With the creation of new technologies, the manners of telecommunication have changed with high-speed. The world is in the midst of the communication and information revolution, and a new lifestyle accompanied with modern telecommunication tools gradually has been formed. The new information highway will change the lifestyle of the people. Many services will be provided by new systems such as telework, telecommuting, teleservices, telemedicine, teleeducation, teleshopping, telebanking, etc. Under this new trend, physical location is becoming irrelevant to the ability to deliver or receive services and goods. The rapid explosion of the Internet and World Wide Web have provided a more convenient way for communication interface linking with computers in global communications, information and data exchanges for those who need it, look for it, and can download it whenever they want. With the rapid coming of the electronic flow of information across the whole world, the role of telecommunication has changed from a voice communications network to a component that underpins many economic activities. With the further development of new telecommunication technologies, the right to communicate should take on a more energetic role.

With the invention of new telecommunication tools and information technologies, several legal problems also arise. For example, should the doctrine of free speech be applied to new communication tools such as pagers, facsimiles, or Internet communications? Due to new high-speed technologies, it is easier to gain personal data and national secrets via cyberspace and multimedia. Does the government already establish a series of measures and regulations to protect the right of privacy and public interests? As mentioned above, the so-called "Encryption" software was invented to protect national confidentiality and personal privacy. However, some people criticize that such measures may be overused to violate the basic right to communicate, such as free expression and free information. "The right to communicate" is one of natural and fundamental rights affirmed by numerous historic legal documents and international agreements. Thus, even new communication tools that have been continually created should be freely used and protected by the name of free speech and free information. The legal standards to balance between these freedoms and national security or between freedoms and privacy also should be applied. In addition, the scope of universal access should be extended to include the Internet and other new electronic tools to support the effective use to achieve democratic ends.

We use the basic telecommunication tool, the telephone, to communicate with our family, friends, coworkers, and deal with thousands of business affairs every

day. We receive, listen, watch and are informed of daily news via broadcasting and television. Recently, we can even attend classes, transact stocks, and send emails through the Internet. However, there are still many people lacking the basic telecommunication access. Considering the principle of equal rights, it is necessary for developed countries to assist developing one to promote basic telecommunication services. As Dr. Tarjanne, the former Secretary-General of ITU said: "The Universal Declaration of Human Rights sets out the rights and freedoms that people everywhere should be able to enjoy. It is the best definition the world community has so far been able to develop of the common elements of humanity shared by all people." For all to enjoy these rights, they must have access to basic communication and information services. He warned: "Without action on the part of the world community, there is a very real danger that the global information society will be global in name only; that the world will be divided into the 'information rich' and the 'information poor'; and that the gap between developed and developing countries will widen into an unbridgeable chasm."[75]

The relation between universal access and the right to communicate is very intimate. By liberalization and establishment of telecommunications, this relationship will achieve a great deal and prove widely beneficial. The developments of advanced telecommunication technology will quickly bring numerous benefits to everyone and everywhere. When the information society becomes a reality, electronic communications are becoming an ever more important tool in promoting the international communications and media regime. Access by individuals, and by collective groups such as governments, organizations, and enterprises, global telecommunication, will continue to inspire development and assistance for developing countries, and will make the information society come true and promote fundamental human rights for everyone.

[75] See ITU News, 1997. No. 6.


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Remarks on Early Medieval Legal Charters – The Legend of "dux Ingo" and his "carta sine litteris"

Abstract. Enea Silvio Piccolomini in his work entitled *De Europa* written in 1458, tells an interesting story defined as a legend in terms of genre about a duke called Ingo, who lived during the reign of Charlemagne. This narrative claims that in 790 *dux gentis* Ingo held a feast for the inhabitants of his province where food was served to the peasants allowed to appear before him in golden and silver bowls, while to the dignitaries standing further away from him in bowls made of clay. The researchers' attention is deservedly raised by the query how come that this parabolical story with biblical tone was included in Enea Silvio's work; if it had been borrowed who the *auctor* might have been he borrowed it from. The answer seems to be very simple: from the *Conversio Bagoariorum et Carantanorum* drafted regarding the lawsuit proceeded against Methodius. In the case narrated in the *Conversio* Ingo sent a charter or much rather a parchment without any writing, or letters on it *(carta sine litteris)*, which provided his legate with sufficient authenticity to demand obedience from the people.

In this study after having compared the two narratives and outlined the place of De Europa in Enea Silvio Piccolomini's oeuvre and the circumstances of the drafting and tendencies of the Conversio Bagoariorum et Carantanorum–the author attempts to answer the following questions. To what extent can duke Ingo, mentioned by Enea Silvio and not questioned in the literature for long centuries, be considered a real historical person? Does the Conversio refer to Ingo as a duke, and if it does, what is his existence as a duke and introduction in the literature as a duke owing to? What could the meaning of carta sine litteris referred to in Conversio have been, and why did Enea Silvio not take this item over although he could have put it forward as a further proof of Ingo's dignity? To what literary prefigurations can the description of the feast held by Ingo be traced back to, and what role did it play in the Conversio? Regarding the borrowing of the Ingo story by Enea Silvio, what possible intermediary writing and author can be reckoned with?

Keywords: Conversio Bagoariorum et Carantanorum, Enea Silvio Piccolomini, carta sine litteris, Early Medieval legal history

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I. Enea Silvio Piccolomini, in chapter sixty-five, book twenty on Carinthia of his work entitled *De Europa* written in 1458, tells an interesting story defined as a legend in terms of genre about a duke called Ingo, who lived during the reign of Charlemagne. This narrative claims that in 790 *dux gentis* Ingo held a feast for the inhabitants of his province where food was served to the peasants allowed to appear before him in golden and silver bowls, while to the dignitaries standing further away from him in bowls made of clay. To the question why he acted like that he answered that the soul of simple people living on the land and in huts but cleaned in baptismal water was white and clean, while the soul of dignitaries living in palaces but adoring idols was dirty and black; and he arranged the feast as the cleanness of the soul required it. The noblemen so ashamed teamed to get baptised, and led by the bishops of Salzburg, Virgil and Arn soon all of them took baptism.[1]

The researchers' attention is deservedly raised by the query how come that this parabolical story with biblical tone was included in Enea Silvio's work; if it had been borrowed who the *auctor* might have been he borrowed it from. The answer seems to be very simple: from the *Conversio Bagoariorum et Carantanorum* drafted regarding the lawsuit proceeded against Methodius, papal legate and archbishop of Sirmium at the Council of Regensburg held in the presence of Louis the German in 870, with the assistance of Adalwin, archbishop of Salzburg and his bishops–either as a bill of indictment or to legitimate the lawsuit subsequently, it cannot be clarified. That work also contains a narrative with Ingo holding a feast as the protagonist.[2]

[1] *Enee Silvii Piccolominei postea Pii PP. II. De Europa* 65. (Ed. Heck, A. van. Città del Vaticano, 2001.) *Fama est anno septimgentesimo nonagesimo post Christi Salvatoris ortum imperante Carolo Magno ducem gentis, Ingonem nomine, ingens convivium provincialibus praeparasse et agrestibus quidem, ad conspectum suum intromissis, in vasis aureis atque argenteis, nobilibus vero ac magnatibus, procul ab oculis collocatis, fictilibus ministrare iussisse. Interrogatum, cur ita faceret, respondisse non tam mundos esse, qui urbes et alta palatia quam qui agros et humiles casas colerent. Rusticis, qui Christi evagelium accepissent, baptismatis unda purificatis candidas et nitidas esse animas; nobiles ac potentes, qui spurcitias idolorum sequerentur, sordidas ac nigerrimas. Se vero pro animarum qualitatibus instruxisse convivium. Casigatos ea re nobiles catervatim sacri baptismatis undam quaerentes brevi tempore sub Vergilio et Arnone iuvavensibus episcopis universos Christi fidem accepisse.*

[2] *Conversio Bagoariorum et Carantanorum* 7. (Ed. Lošek, F. Monumenta Germaniae Historica (MGH) Studien und Texte 15. Hannover, 1997.) *Simili modo etiam Arn episcopus successor sedis Iuvavensis deinceps curam gessit pastoralem, undique ordinans presbyteros et mittens in Sclavinam, in partes videlicet Quarantanas atque inferioris Pannoniae, illis ducibus atque comitibus, sicut pridem Virgilius fecit. Quorum unus Ingo vocabatur, multum carus populis et amabilis propter suam prudentiam. Cui tam oboediens fuit omnis populus,*

II. Enea Silvio Piccolomini[3] was born in 1405 as a child of an impoverished noble family in Corsignano close to Siena. He completed his studies in Siena and Florence, at the Council of Basel (1431–1449) he acted as the secretary of Domenico Capranica and other church dignitaries until 1435. He was crowned *poeta laureatus* by Frederick III (1440–1493), and was offered a secretary's office at the Imperial Chancellery, which he accepted. In 1447 he had him ordained a priest, and from then on he ascended fast in the church's hierarchy: in 1447 he became the bishop of Trieste, in 1450 of Siena; in 1456 he was ordained cardinal; after the death of Pope Callixtus III (1455–1458) in 1458 he was elected the pope–as *pontifex maximus* he took the name Pius II. As a pope he deemed his key errand was to organise the crusade against the Turks; however, his plans failed. (This fight represented a peculiar stage in his career, bearing witness of little political realism though; he wanted to stop the Islam threatening Christianity through peaceful negotiations: in 1461 he wrote a letter

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ut, si cuique vel carta sine litteris ab illo directa fuit, nullus ausus est suum neglegere praeceptum. Qui etiam mirabiliter fecit: Vere servos credentes secum vocavit ad mensam, et qui eorum dominabantur infideles, foris quasi canes sedere fecit ponendo ante illos panem et carnem et fusca vasa cum vino, ut sic sumerent victus. Servis autem staupis deauratis propinare iussit. Tunc interrogantes primi deforis dixerunt: 'Cur facis nobis sic?' At ille: 'Non estis digni non ablutis corporibus cum sacro fonte renatis communicare, sed foris domum ut canes sumere victus.' Hoc facto fide sancta instructi certatim cucurrerunt baptizari. Et sic deinceps religio christiana succrescit.

[3] About life and work of Enea Silvio see Voigt, G.: *Enea Silvio del Piccolomini als Papst Pius der Zweite und sein Zeitalter I–III.* Berlin, 1856–1863; Pór A.: *Aeneas Sylvius–Pius pápa.* (Aenea Sylvius–Pope Pius) Budapest, 1880; Boulting, W.: *Aeneas Sylvius, orator, man of letters, statesman and pope.* London, 1908; Ady, C. M.: *Pius II. (Aeneas Silvius Piccolomini), the humanist pope.* London, 1913; Hocks, E.: *Pius II. und der Halbmond.* Freiburg im Breisgau, 1941; Papparelli, G.: *Enea Silvio Piccolomini.* Biblioteca di cultura moderna 481. Bari, 1950; Bürck, G.: *Selbstdarstellung und Personenbildnis bei Enea Silvio Piccolomini (Pius II.).* Basler Beiträge zur Geschichtswissenschaft 56. Basel–Stuttgart, 1956; Mitchell, R. J.: *The Laurels and the Tiara, Pope Pius II. 1458–1464.* London, 1962; Gebel, D.: *Nikolaus von Kues und Enea Silvio Piccolomini – Bilder der außereuropäischen Welt als Spiegelung europäischer Sozialverhältnisse im 15. Jahrhundert.* Hamburg, 1977; Blusch, J.: Enea Silvio Piccolomini und Giannantonio Campano – Die unterschiedlichen Darstellungsprinzipien in ihren Türkenreden. *Humanistica Lovaniensia* 28 (1979) 78–138; Weining, P. J.: *Aeneam suscipite, Pium recipite. Die Rezeption eines humanistischen Schriftstellers im Deutschland des 15. und 16. Jahrhunderts.* Wiesbaden, 1998; Nótári T.: *Szemelvények Aeneas Sylvius Piccolomnini Európa című művéből.* (Fragments from "De Europa" by Aeneas Sylvius Piccolomini) Documenta Historica 42. Szeged, 1999; Nótári T.: Aeneas Sylvius Piccolomini szónoki művészete. (Rhetorical art of Aeneas Sylvius Piccolomini) In: *Középkortörténeti tanulmányok.* (Studies on Middle Ages) Szeged, 2003. 103–112.

to Mohamed II calling the sultan to leave his faith and become Christian.[4] His deteriorated health prevented him from leading the slowly gathering armies as he had wanted to: in 1464 he died in Ancona.

His works on history (Historia Austrialis, 1453/58; Germania, 1457; Historia Bohemica, 1458; De Europa, 1458; De Asia, 1461)5 produced a great impact on the evolving historiography of the modern age. His wok entitled De Europa has been bequeathed to us in codices usually under the title Gesta sub Federico III, or De gestis sub Federico III; it was given the title De Europa known today in the first printed publications (Memmingen, 1490; Venice, 1501; Paris, 1509). Enea completed De Europa when he was a cardinal in 1458; inconsistent references here and there and disproportionate parts of the structure that occur on and off can be attributed to his not having time and opportunity as a pope to edit the book to be published more precisely.

III. The protagonists of the Slavonic (and Avar) mission in the 9th century were the Byzantine Empire, on the one hand, and the Frankish Empire, which relied on the Archbishopric of Salzburg and the Patriarchy of Aquilea pursuing fairly independent politics, on the other;[6] this balance was disrupted by the papacy, which was gaining strength, taking firm steps with independent mission policy against the power of the Carolingian dynasty. This threefoldness provided the background of the activity of Methodius known as the Apostle of the Slavs and of his conflict with the Archbishopric of Salzburg and its diocesan bishops. At the Council of Regensburg held in the presence of Louis the German in 870, Adalwin, archbishop of Salzburg and his bishops passed a judgment on Methodius, a missionary from Byzantium, then papal legate and archbishop of Sirmium, since they deemed that by his missionary activity pursued in Pannonia Methodius infringed the jurisdiction of Salzburg exercised over this territory for seventy-five years, and after that they held him in captivity for two and a half years. It was this lawsuit regarding which the *Conversio Bagoariorum et Carantanorum*[7] was drafted either as a bill of indictment or to

[4] About this letter see Toffanin, G.: *Pio II. (Enea Silvio Piccolomini): Lettera a Mao metto (Epistula ad Mahumetem).* Collezione umanistica diretta da G. Toffanin 8. Napoli, 1953.

[5] Cf. Buchwald, W.–Hohlweg, A.–Prinz, O.: *Tusculum-Lexikon griechischer und lateinischer Autoren des Altertums und des Mittelalters.* München, 1963. 406.

[6] Reindel, K.: *Politische Geschichte Bayerns im Karolingerreich.* In: v. Spindler, M. (Hrsg.): Handbuch der bayerischen Geschichte I., München, 1981^2. 249sqq.

[7] Löwe, H.: *Der Streit um Methodius. Quellen zu den nationalkirchlichen Bestrebungen in Mähren und Pannonien im 9. Jahrhundert.* 1948. 3. sqq.; Ziegler, A. W.: Methodius auf dem Weg in die schwäbische Verbannung. *Jahrbücher für Geschichte Osteuropas, Neue*

legitimate the lawsuit subsequently, it cannot be clarified. The tendency of the presentation of the *Conversio* has been characterised quite to the point by Kahl as follows: "It plays a brave game on the verge of truth; its statements are just unattackable for well-informed readers, and it leaves open, what is more, suggests several different possibilities of combination for uninformed ones; being fully aware of the facts and his task the author conceals undesirable and 'dangerous' connections and facts and relates events far from each other with a considerable amount of cunning".[8]

The *Conversio Bagoariorum et Carantanorum*, that is, *"The Conversion of the Bavarians and the Carantanians"*, highly acknowledged in his comments

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Folge 1 (1953) 369. sqq.; Hauck, A.: *Kirchengeschichte Deutschlands II.* Berlin–Leipzig, 1954[8]. 724; Bosl, K.: Probleme der Missionierung des böhmisch-mährischen Herrschaftraumes. In: v. Hellmann, M.–Olesch, R.–Stasiewsqi, B.–Zagiba, F. (Hrsg.): *Cyrillo-Methodiana. Zur Frühgeschichte des Christentums bei den Slaven 863–1963.* Graz, 1964. 1. sqq.; Schellhorn, M.: Erzbischof Adalwin von Salzburg und die Pannonische Mission. *Mitteilungen der Gesellschaft für Salzburger Landesgeschichte* 104 (1964) 104. sqq.; Richter, M.: Die politische Orientierung Mährens zur Zeit von Konstantin und Methodius. In: v. Wolfram, H.–Schwarz, A. (Hrsg.): *Die Bayern und ihre Nachbarn I.* Veröffentlichung der Kommission für Frühmittelalterforschung 8. Wien, 1985. 283. sqq.; Dopsch, H.: Slawenmission und päpstliche Politik – Zu den Hintergründen des Methodios-Konfliktes. In: v. Pifll-Perčević, Th.–Stirnemann, A. (Hrsg.): *Der heilige Method, Salzburg und die Slawenmission.* Innsbruck–Wien, 1987. 307. sqq.; Eggers, M.: *Das Erzbistum des Method. Lage, Wirkung und Nachleben der kyrillomethodianischen Mission.* Slavistische Beiträge 339. München, 1996. 19; Nótári T.: Conversio Bagoariorum et Carantanorum. *Aetas* 2000/3. 93. sqq.; H. Tóth I.: *Cirill-Konstantin és Metód élete, működése* (Life and Work of Cirill-Constantine and Methodius). Szeged, 2003[3]. 96. sqq.; Nótári T.: *Források Salzburg kora középkori történetéből* (Sources from the History of Early-Medieval Salzburg). Szeged, 2005; Nótári T.: *A salzburgi historiográfia kezdetei* (The Beginning of Historiography in Salzburg). Szeged, 2007; Nótári, T.: *Show Trials and Lawsuits in Early-Medieval Bavaria.* Rechtsgeschichtliche Vorträge 53. Budapest, 2008.

[8] Kahl, H.-D.: Virgil und die Salzburger Slawenmission. In: v. Dopsch, H.–Juffinger, R. (Hrsg.): *Virgil von Salzburg – Missionar und Gelehrter.* Salzburg, 1985. 112. *Was da getrieben wird, ist nichts anderes als ein waghalsiges Spiel dicht an der Grenze der Wahrheit, gerade noch unanfechtbar für den, der Bescheid weiß, dem Unkundigen jedoch abweichende Kombinationen offenlassend, ja nahelegend, die den Zwecken der Denkschrift ungleich besser entgegenkamen. Man ahnt einen wohlunterrichteten Gewährsmann, der jedoch sehr wohl weiß, was er will, was nicht, und man bedauert, daß er von seinen Kenntnissen keinen besseren Gebrauch gemacht hat. Raffiniertes Verschweigen unerwünschter oder gar „gefährlicher" Zusammenhänge und Fakten, ähnlich raffinierte Zusammenziehung von Ereignissen, die womöglich weit auseinanderlagen – das sind auch sonst die Hauptmittel, die der Verfasser für seinen Zweck einsetzt.*

by Alphons Lhotsky,[9] is worth drawing the attention of research in Hungary since, among other things, it belongs to the texts in Latin, in addition to Eugippius's *Vita Sancti Severini* and Iordanes's *Getica*, which give a more coherent relation from the age following the great migrations and preceding the conquest by Árpád on the territory of the later Hungary, and so it has outstanding significance among the sources of 9th c. Avar history. The importance of the history of the Avars in terms of the history of Hungary following it has been summed up quite to the point by Samu Szádeczky-Kardoss: "*... in the course of history known from written sources it was during the age of the Avars that the western and eastern part of the Central Danube Basin became a formation permanently belonging together for the first time (Pannonia and Dacia of the Roman empire were separated by the Sarmatian Barbaricum lying between them). In this sense the Avar Chaganate was a forerunner of the later Hungary.*"[10]

In his 1979 edition, Herwig Wolfram, on the grounds of the relevant sentence in chapter fourteen of the *Conversio*[11] accepted A.D. 871 as the year of drafting;[12] in his monograph in 1995, however, he modified his position, and based his determination on the medieval form of calculation, which demands that the year indicated in the text should be added to the years passed; accordingly, he finally declared that A.D. 870 was the year of drafting;[13] in his edition Fritz Lošek shares this position.[14] Regarding the person of the author deductions can be made only from some references made in the work; however, it is not possible to identify him with absolute certainty. Wolfram deems it is probable that archbishop Adalwin himself might have been the *auctor*, but he phrases

[9] Lhotsky, A.: *Quellenkunde zur mittelalterlichen Geschichte Österreichs.* Graz–Köln, 1963. 155. *Die Conversio Bagoariorum et Carantanorum, das Haupt- und Glanzstück der ruhmvollen Salzburger Historiographie. ... eine merkwürdige und in ihrer Art schöne Schrift.*

[10] Szádeczky-Kardoss S.: *Az avar történelem forrásai 557-től 806-ig.* (The Sources of the Avar History from 557 to 806) Budapest, 1998. 9.

[11] *Conversio* 14. *A tempore igitur, quo dato et praecepto domini Karoli imperatoris orientalis Pannoniae populus a Iuvavensibus regi coepit praesulibus usque in praesens tempus sunt anni LXXV...*

[12] Wolfram, H.: *Conversio Bagoariorum et Carantanorum. Das Weißbuch der Salzburger Kirche über die erfolgreiche Mission in Karantanien und Pannonien.* Wien–Köln–Graz, 1979. 15; 141.

[13] Wolfram, H.: *Salzburg, Bayern, Österreich. Die Conversio Bagoariorum et Carantanorum und die Quellen ihrer Zeit.* Mitteilungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband 31. Graz–Wien–Köln, 1995. 193.

[14] Lošek, F.: *Die Conversio Bagoariorum et Carantanorum und der Brief des Erzbischofs Theotmar von Salzburg.* MGH Studien und Texte 15. Hannover, 1997. 6.

his view rather cautiously.[15] On the other hand, it can be ascertained with utmost probability from a passage in the first person singular which can be read in the fifth chapter that the author came from Salzburg, Bavaria.[16] Archbishop Adalwin's authorship might be supported by the following considerations: another formulation in the first person singular directly follows the point of the text where Adalwin is named; so the writer might have named the person who ordered the writing.[17] Similarly, one can ponder over the fact that the attribute *piissimus* is used in the text of the *Conversio* as the epithet of only two persons, and they are Adalwin[18] and Louis the German:[19] possibly the author and the addressee of the work.[20]

IV. Ingo first appeared, as a nobleman, more specifically, as the first duke of Carantania, in *Liber certarum historiarum* from the pen of abbot Iohannes Victoriensis, who died in 1345/47.[21]

In addition to the story of Ingo, Iohannes Victoriensis (Johann von Viktring) borrowed Charlemagne's missionary commission given to Arn[22] and the events surrounding Methodius's appearance on the scene[23] from the *Conversio*;[24] how-

[15] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 197.

[16] *Conversio* 5. *... orta seditione, quod carmula dicimus.* Cf. Schwind, E. v. (ed.): *Lex Baiuvariorum* 2, 3. MGH LL nat. Germ. 5, 2. Hannover, 1926. *Si quis seditionem excitaverit contra ducem suum, quod Baiuvarii carmulum dicunt.*

[17] *Conversio* 9. *... et adhuc ipse Adalwinus archiepiscopus per semetipsum regere studet illam gentem in nomine Domini, sicut iam multis in illis regionibus claret locis.*; *Conversio* 10. *Enumeratis itaque episcopis Iuvavensium conamur, prout veracius in chronicis imperatorum et regum Francorum et Bagoariorum scriptum repperimus, scire volentibus manifestare.*

[18] *Conversio* 9. *... anno nativitatis Domini DCCCXXI Adalrammus piissimus doctor sedem Iuvavensem suscepit regendam.*

[19] *Conversio* 12. *Pervenit ergo ad notitiam Hludowici piissimi regis, quod Priwina benivolus fuit erga Dei servitium et suum.*

[20] Lošek: *op. cit.* 6.

[21] Iohannes abbas Victoriensis, Schneider, F. (ed.): *Liber certarum historiarum* 2, 13. MGH SS rer. Germ. 1909. *"Nam anno Domini septingentesimo nonagesimo sub Karolo imperatore et Ingone duce et Vergilio et Arnone episcopis Iuvavensibus Ingo dux nobiles terre et servos eis subiectos ad convivium invitavit et nobiles quidem tamquam canes et immundos deputavit et pane et carnibus foris ab oculis suis pavit et vinum in vasis fuscis propinavit, servos vero vasis splendidis et deauratis in sua presencia collocavit. Et dum quererent nobiles, quid in hoc pretenderet, respondit hos simplices et fideles, mundos et sacro baptismate confirmatos, eos autem immundos atque indignos sine sacri fontis ablucione existere et fedatos. Qui audientes certatim ad baptismum cum fervore fidei cucurrerunt ...".*

[22] *Conversio* 8.

[23] *Conversio* 12.

ever, this borrowing was mostly limited to elements of content; in its language and style the relevant parts of *Liber certarum historiarum* are highly independent of the *Conversio*.[25] Marcus Hansiz identified Ingo with Carantania's legendary duke, Domitianus.[26] The legend tells that the heathen duke Domitianus cruelly persecuted Christians; then, through God's mercy he was converted. He himself thrust pagan idols to the bottom of the pond, and finally became Carantania's duke leading the life of a saint.[27] The historical existence of Domitianus, who is usually referred to the realm of legends,[28] might be supported by the fragment of an inscription, presumably from the 9th c., found in the monastery of Millstatt;[29] due to the difficulty to date the *inscriptio* exactly and the contradicting tendency of other sources, Herwig Wolfram righteously warns researchers to be cautious.[30] An interesting aspect should be added here: Eisler, who took a stand in favour of the historical authenticity of Domitianus and acted with great zest to attain canonisation, alleged to find the original form of the name Domitianus in the Slavic Domizlaus, and called the attention to the possible relation between the legend of the duke hurling down pagan idols and the etymology of Millstatt implying statues *(mille statues)*.[31]

Modern research has mostly accepted duke Ingo as a historically authentic person,[32] and attempted to identify the bearer of this German but not Bavarian name with a historical person who occurs in a tradition co-existing with the *Conversio*. Michael Mitterauer, for example, identifies him with Etgar, a provably existing Carantanian duke, who appears in chapter ten of the *Conversio*.[33] As a further hypothesis it is worth mentioning that Ingo is also identified with the Slavic Voinimir *(Wonomyrus Sclavus)*, who attacked the Ring in late autumn

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[24] Lhotsky*op. cit.* 293. sqq.

[25] Lošek 1990. 52; Fichtenau, H.: Herkunft und Sprache Johanns von Viktring. *Carinthia I.* 165 (1975) 25. sqq.

[26] Hansiz, M. *Germania Sacra II.* 1729. 104.

[27] Eisler, R.: Die Legende vom heiligen Karantanenherzog Domitian. *Mitteilungen des Instituts für österreichische Geschichtsforschung* 28 (1907) 91. sqq.

[28] Nikolasch, F.: Domitian von Millstatt – eine Erfindung des 12. Jahrhunderts? *Carinthia I.* 180 (1990) 253. sqq.

[29] Glaser, F.: Eine Marmorinschrift aus der Zeit Karls des Großen. *Carinthia I.* 183 (1993) 303–318.

[30] Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 289.

[31] Eisler: *op. cit.* 90.

[32] Ingo mentioned as *comes* – see Hauck, A.: *Kirchengeschichte Deutschlands.* Berlin–Leipig, 1954[8]. II. 480.

[33] Mitterauer, M.: Slawischer und bayerischer Adel am Ausgang der Karolingerzeit. *Carinthia I.* 150 (1960) 695[18].

or early winter in 795 on the orders of Erich, duke of Friaul;[34] however, only guesses can be made as to in what rank and position Voinimir served the duke.[35] It is another interesting, albeit, hypothetical attempt to identify Ingo with Unguimeri, who figures in *Rhythmus de Pippini regis victoria Avarica*;[36] in 796 (when the Frank/Langobard/Bavarian army led by Pippin was nearing) Unguimeri augured meeting with a treacherous end for the chagan and his chief wife, the chatun).[37] Unguimeri's name is usually identified with the name of the German duke, Inguiomer(us), referred to several times in Tacitus's *Annales*;[38] on the grounds thereof Unguimeri is customarily considered one of the Gepids who continued to live in the Avar empire.[39] Walter Pohl deems it is more probable that Unguimeri made it to the Avars as a Langobard emigrant.[40] Others risk making the assumption that Unguimeri might be identical with the aforesaid Slavic Voinimir.[41]

In his 1979 edition and 1995 monograph Herwig Wolfram takes the poisonous tooth of the question out as follows. Ingo as a duke is to thank his existence merely to an interpretation/translation error which allowed room for schematism as the first word of the sentence *"Quorum unus ..."*, the relative pronoun, was improperly related, instead of the missionaries sent by Arn[42] to Carantania and Pannonia Inferior, to the dignitaries living there (whom and their people the missionaries had to convert).[43] Since the phrase *illis ducibus atque*

[34] Kurze, F. (ed.): *Annales regni Francorum a.* 796. MGH SS rer. Germ. 6. Hannover 1895.

[35] Pohl, W.: *Die Awaren – Ein Steppenvolk in Mitteleuropa 567–822 n. Chr.* München, 1988. 319–320; Szádeczky-Kardoss: *Az avar történelem... op. cit.* 286. sqq.; Wolfram, H.: *Die Geburt Mitteleuropas. Geschichte Österreichs vor seiner Entstehung. 378–907.* Wien 1987. 258.

[36] Dümmler, E. (ed.): *Rhytmus de Pippini regis victoria Avarica* cc. 6. sqq. PP I. MGH Berlin, 1881.

[37] Szádeczky-Kardoss: *op. cit.* 293.

[38] Borzsák, I. (ed.): Tac. *ann.* 1, 60. 68; 2, 17. 21. 45. 46. Leipzig, 1991.

[39] Cf. Lakatos, P.: *Quellenbuch zur Geschichte der Gepiden.* Szeged, 1973. 115. sqq.

[40] Pohl: *op. cit.* 230. sq.

[41] Lésny, J.: Unguimer. In: Halvík, L.: (red.) *Lexicon Antiquitatum Slavicarum VI.* Wratislawiae, 1977. 264. sq.; *Magnae Moraviae Fontes Historici I–IV.* Praha–Brno, 1966–1971. (Brno, 1967.) II. 14; (Brno, 1969.) III. 305.

[42] About Arn see Demmelbauer, G.: *Arno, der erste Erzbischof von Salzburg 798–821.* Wien, 1950; Niederkorn-Bruck, M.–Scharer, A. (Hrsg.): *Erzbischof Arn von Salzburg.* Veröffentlichungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband 40. Wien–München, 2004.

[43] Wolfram: *Conversio... op. cit.* 96. sqq.; Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 288. sq.

comitibus in dative is closer to the end of the sentence than *presbyteros* in accusative, which is the object of the sentence, the subject of the next sentence was grammatically and logically improperly related not to the actual object.[44] In Arn's time it was the *duces*, that is, the Carantanian *duces* and the *comites*, the agents representing the Frankish/Bavarian rule who administered this territory; this locus of the *Conversio* is meant to underline that the missionary methods applied by Virgil to Carantania were adopted also by Arn with respect to Pannonia. Just as Rupert had never got to Pannonia Inferior,[45] Virgil was unable to organise the conversion of this territory–thus, the sentence beginning with the phrase *"Simili modo ..."* is meant to emphasise Arn's act of sending priests to Pannonia.[46]

This argument seems to be supported also by *Excerptum de Karentanis*, which lists all the names related to the Carantans that occur in the *Conversio*, except for priests and deacons, but says nothing about any monarch or duke called Ingo. *Excerptum de Karentanis* was drafted at the turn of 12th and 13th c.[47] Basically it contains the names of key secular and ecclesiastical leaders keeping up relations with the Carantans; their list was compiled by the author

[44] The question, whether *"unus"* belongs to the *presbyteri*, the *duces* or the *comites* arose in a study by Jaksch – see Jaksch, A.: Fredegar und die Conversio Carantanorum (Ingo). *Mitteilungen des Instituts für österreichische Geschichtsforschung* 41 (1926) 44. sqq.

[45] Levison, W. (ed.): *Conversio* 1; *Gesta sancti Hrodberti confessoris* 5. *MGH SS* rer. Merov. 6. Hannover–Leipzig. 1913.) About Rupert and the *Gesta Hrodberti* see Beumann, H.: Zur Textgeschichte der vita Ruperti. In: *Festschrift für H. Heimpel.* Veröffentlichungen des Max-Planck-Instituts für Geschichte 36. 1972. 166. sqq.; Baltl, H.: Zur Datierungfrage des hl. Rupert. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 61 (1975) 1. sqq.; Reindel, K.: Die Organisation der Salzburger Kirche im Zeitalter des hl. Rupert. *Mitteilungen der Gesellschaft für Salzburger Landesgeschichte* 115 (1975) 88. sqq.; Wolfram, H.: Der heilige Rupert in Salzburg. In: v. Zwink, E. (Hrsg.): *Frühes Mönchtum in Salzburg.* Salzburger Diskussionen 4. Salzburg, 1983. 84. sqq.; Schmitt, F.: Zur Vita Ruperti. In: *Frühes Mönchtum in Salzburg.* Salzburger Diskussionen 4. Salzburg, 1983. 96. sqq.; Jahn, J.: *Ducatus Baiuvariorum. Das bairische Herzogtum der Agilolfinger.* Monographien zur Geschichte des Mittelalters 35. Stuttgart, 1991. 54. sqq.; Forstner, K.: Quellenkundliche Beobachtungen an den ältesten Salzburger Güterverzeichnissen und an der Vita s. Ruperti. *Mitteilungen der Gesellschaft für Salzburger Landesgeschichte* 135 (1995) 473. sqq.; Wolfram: *Salzburg, Bayern, Österreich... op. cit.* 228. sqq.

[46] Wolfram: *Conversio... op. cit.* 97.

[47] *Excerptum de Karentanis* 2. *Tempore Dagoberti regis Francorum preerant Karentanis dux Samo, post quem Boruch, post quem Karastus et post hunc Chenmarus, et post hunc Waltunc. Item sub Karolo et eius successoribus Priwizlauga, Cemicas, Zpoimar, Etgar.*

from the relevant sentences and phrases of the *Conversio*. (Proper names are written slightly differently in the *Excerptum* than in the *Conversio*.) Returning to enumerating the grammatical arguments commenced: if we take sides with the "... *presbyteros ... Quorum unus ...*" interpretation, then we need to attempt to prove the existence of a presbyter Ingo in Arn's time on the strength of sources from Salzburg. An entry from the age of Arn in the *Liber confraternitatum* refers to a *presbyter* named Ingo.[48] Its is worth adding that apart from the Ingo mentioned in the *Liber confraternitatum* and the *Conversio*, we have no knowledge of any person bearing this name in this period in Bavaria.[49] The relevant locus of the *Liber confraternitatum* lists Ingo as the first item in the register of fourteen ecclesiastical persons, and each of the fourteen names is followed by the entry *presbyter* (contrary to the lines surrounding this entry). Most probably, Ingo was the head of the group of missionaries sent by Arn to Carantania; the activity of this group can be dated to the period between 785 and 799 since in the year following the year he was promoted to the office of archbishop Arn ordered a wandering bishop, *episcopus chori*, called Theoderich to the territory of Carantania.[50] Consequently, Ingo headed the mission in Carantania for almost fifteen years, and *prudentia* required in this position bestowed high esteem on him, which is confirmed by several examples referred to in the *Conversio*.[51] Herwig Wolfram's above described argument has been mostly accepted in the literature: his view was shared by Karl Schmid in his study on *Liver confraternitatum*,[52] and was also accepted by Fritz Lošek in his 1997 edition.[53]

V. In the case narrated in the *Conversio* Ingo sent a charter or much rather a parchment without any writing, or letters on it *(carta sine litteris)*, which provided his legate with sufficient authenticity to demand obedience from the

[48] Herzberg-Fränkel, S. (ed.): *Liber confraternitatum sancti Petri Salisburgensis vetustior* 48. MGH Necr. 2. Berlin, 1904; Forstner, K. (ed.): Das Verbrüderungsbuch von St. Peter in Salzburg. Codices Selecti 51. Graz, 1974.

[49] Wolfram: *Conversio... op. cit.* 98.

[50] *Conversio* 8.

[51] Wolfram: *Conversio... op. cit.* 99.

[52] Schmid, K.: Das Zeugnis der Verbrüderungsbücher zur Slawenmission. In: v. Pfiffl-Perčević, Th.–Stirnemann, A. (Hrsg.): *Der heilige Method, Salzburg und die Slawenmission.* Innsbruck–Wien, 1987. 188.

[53] Lošek: *op. cit.* 112.

people. Although the *carta* as a fully conclusive deed[54] was transplanted by the Germans from the Romans into their legal system, the *carta* did not obtain absolute respect among the Germans who did not know either the Latin of charters or the art of writing and reading; therefore, simultaneously with adopting this institution the process of refusing, re-evaluating it began.[55] Concerning this fact it can be stated the lack of writing on the *carta* sent by Ingo cannot be considered surprising for another reason either: the newly converted Slavs and Avars were also illiterate as it was highlighted in the minutes of the *Conventus episcoporum ad ripas Danubii* held in 796.[56]

The Frank, Bavarian, Alemannian and Burgundian legal practice worked out a rather unique form of documentary evidence. The charter, that is, more specifically, the parchment yet blank, which would become a *carta* through writing the text on it, became a symbol similar to the rod in assigning real estates:[57] in the legal transaction it was placed on the ground; then, the person issuing the writing lifted it from the ground, and handed it over to the scrivener while making the proper statement of will. (Regarding the provision requiring the parchment directly touching the ground, as a parallel, it is worth underlining the peculiar feature of *mancipatio* and *legis actio sacramento in rem* known from Roman law that the parties had to touch the subject of the transaction and the lawsuit with the rod simultaneously. The act of touching was meant to advance not only more exact determination, since the act of unambiguous pointing at would have been sufficient: the act of touching, a practice containing religious/magic elements applied in archaic legal systems maintaining direct relation with the realm of the sacred, "created" the possibility of closer attach-

[54] As analogy from the history of the *stipulatio* from the postclassical age of Roman law Földi, A.–Hamza, G.: *A római jog története és institúciói.* (History and Institutions of Roman Law) Budapest, 2008[13]. 159.

[55] Kos, M. Carta sine litteris. *Mitteilungen des Instituts für österreichische Geschichtsforschung* 62 (1954) 98; Fichtenau, H. *Das Urkundenwesen in Österreich vom achten bis in das dreizehnte Jahrhundert.* Mitteilungen des Instituts für österreichische Geschichtsforschung, Ergänzungsband 23. Graz–Wien–Köln 1971. 56. sqq.

[56] Zagiba, F.: Die Missionierung der Slaven aus "Welschland" (Patriarchat Aquileia) im 8. und 9. Jahrhundert. In: Werminghoff, A. (ed.): *Cyrillo-Methodiana. Zur Frühgeschichte des Christentums bei den Slaven 863–1963.* Graz, 1964. 280; *Conventus episcoporum ad ripas Danubii* MGH Conc. 2, 1. Hannover–Leipzig, 1906. 174.) *Haec autem gens bruta et inrationabilis vel certe idiotae et sine litteris ...*

[57] About the rod and the staff as legal symbols see Nótári, T.: Festuca autem utebantur quasi hastae loco. *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae* 41 (2004) 133–162; Nótári, T.: The Spear as the Symbol of Property and Power in Ancient Rome. *Acta Juridica Hungarica* 48 (2007) 231–257.

ment, transmission of will.[58]) Sometimes, the parchment had been completed using a formula in advance but the witnesses' seal and the scrivener's signature and the date were affixed to it only later–consequently, *de iure* it was deemed unwritten since it failed to have the necessary accessories of validity.[59] Sometimes the symbolic nature of the *carta* was reinforced also by placing the ink pot and the pen beside the parchment on the ground, and the person issuing the charter had to lift them together with the parchment, and hand it over to the scrivener while making the statement of will.[60] On the other hand, Wolfram raises the question whether a blank parchment, like the one mentioned in Ingo's story, had sufficient demonstrative force, and if it bore some kind of signs *(signa)*, or seal.[61] Ignoring the seal of the duke and bearers of dignities was, otherwise, sanctioned by both the Alemannian and Bavarian law.[62]

The object, the symbol, the unfilled out parchment, which was therefore not considered a *carta* indeed, counted more than the validly issued charter, which, anyhow, very few people would have been able to read. What the narrative in the *Conversio* specifically reveals is that the sheer act of sending the parchment, which could become a charter only subsequently when legally issued, was sufficient to produce the required effect. It is perfectly in line with this that the validity of the assignment of property was established not by the *carta* but the ceremony performed simultaneously with making the statement of will where the parchment placed on the ground was lifted and handed over to the scrivener.[63] Among people unable to read, the object, the parchment, which constituted the basic material of the *carta*, had sufficient demonstrative force just as the seal by itself "spoke" in a language understandable by everybody without being able to read what was written on it.[64] In Milko Kos's formulation *carta sine litteris* meant: *"Ingo sent me, obey my orders."*–as an

[58] See Nótári, T.: *Jog, vallás és retorika* (Law, Religion and Rhetoric). Szeged, 2006. 51. sqq.; Hägerström, A.: *Der römische Obligationsbegriff I.* Uppsala, 1927.

[59] Redlich, O. Privaturkunden des Mittelalters. In: Erben, W.–Schmitz-Kallenberg, L.–Redlich, O.: *Urkundenlehre III.* München–Berlin, 1911. 47. sqq.; Goldmann, E. Cartam levare. *Mitteilungen des Instituts für österreichische Geschichtsforschung* 35 (1914) 3. sqq.

[60] Kos: *op. cit.* 99.

[61] Wolfram: *Conversio... op. cit.* 199.

[62] Lehmann, K. (ed.): *Leges Alamannorum* 22, 2. MGH LL nat. Germ. 5, 1. Hannover, 1888; *Lex Baiuvariorum* 2, 13.

[63] Kos: *op. cit.* 99; Fichtenau: *op. cit.* 57; Redlich, O.: Über bairische Traditionsbücher und Traditionen. *Mitteilungen des Instituts für österreichische Geschichtsforschung* 5 (1884) 6.

[64] Redlich: *op. cit.* 108. sqq.

analogy he refers to the inscription on the seal of Otto von Trixen *"Ott de Trussen me misit"*[65] from the late 12th c.[66]

In view of the above, it is more or less irrelevant whether the act of sending the parchment by Ingo is seen as a historical fact or a parable merely symbolising his authority since the element of *carta sine litteris* somehow had to be in line with 9th c. reality, or else it would not have been comprehensible to the addressee, or other readers of the *Conversio*. It can be attributed specifically to the difficulties in interpretation that later ages faced that the element of *carta sine litteris*, which would have required knowledge of contracting and charter practices of German laws *(Volksrechte)* in the early Middle Ages to become understandable, was not an instructive material for later authors to be transplanted into their works. So, for example, it was not included in Enea Silvio Piccolomini's *De Europa* either, contrary to the narrative on Ingo's feast.

VI. In terms of genre, Ingo's feast can be classified a Christian parable; its build-up follows the structure of biblical parables: it intends to present the success of the mission in Carantania as an image to those already converted. The host favours Christians (even if they are serfs) with golden bowls; however, the unbelievers (no matter that they are lords) are forced to eat from dirty bowls before the doors like dogs. The message of Ingo's story clearly corresponds with the narrative in the Gospel of Matthew on the royal feast where those who appear in improper garments, that is, with unclean body, using the phrase of the *Conversio*, are cast out into the dark outside where there is crying and gnashing of the teeth.[67] Christianity, thus, makes serfs noble too; lack of faith, however, makes noblemen inferior and dirty.[68] Ingo's parable is far from being unique: a similar story has been left to us on heathen duke, Bořivoj, who lived in the court of Svatopluk in Moravia;[69] also, Arnold Jaksch has demonstrated that the story in the *Conversio* has links with a locus of Fredegar's Chronic.[70]

[65] Jaksch, A.: *Monumenta historica ducatus Carinthiae III.* Klagenfurt, 1904. Nr. 1413.

[66] Kos: *op. cit.* 100.

[67] Matth. 22, 1–14. Cf. Matth. 15, 26; 2. Tim. 2, 20; Apoc. 22, 15.

[68] Wolfram: *Conversio... op. cit.* 100.

[69] Magnae Moraviae Fontes Historici Brno, 1969. III. 305. About possible connections between this legend and the *Conversio* see Pekař, J.: *Die Wenzels- und Ludmilla-Legenden und die Echtheit Christians.* Prag, 1905. 92.

[70] Jaksch: *op. cit.* 154.

It is worth adding that this is not the only link between Fredegar's *Chronica* and the *Conversio*. The section on Samo in chapter four of the *Conversio*[71] amply draws on Fredegar's opus.[72] The cited loci clearly reveal that the story on Samo left to us by Fredegar presents aspects of the events basically different from the *Conversio*. Fredegar claims that in 623/24 Samo of Frankish origin went to the Slavs as a trader of arms and perhaps as the delegate of King Dagobert I (623–639) to support their efforts to become independent. Making use of the collapse of the first Avar Chaganate shaken by the unsuccessful siege of Constaninople in 626,[73] Samo became the ruler of a Slavic state in Central Europe established by him. It was this state that Dagobert I wanted to wind up, but in his efforts he failed, and Samo's country ceased to exist only after Samo's death in approx. 658. The *Conversio* asserts, however, that Samo was a *dux gentis* of Carantanian origin, and the armies of Dagobert I successfully beat the Slavic rebels. When writing this version of the story the author of the *Conversio* used instead of Fredegar's *Chronica* the work entitled *Gesta Dagoberti I. regis Francorum* which drew on it, and created his own version by making Samo, who figured there as the duke of the Slavs, Slavic too; and identified the Slavic state attacked by the Franks and the Langobards jointly with Carantania.[74]

[71] *Conversio* 4. *Temporibus gloriosi regis Francorum Dagoberti Samo nomine quidam Sclavus manens in Quarantanis fuit dux gentis illius. Qui venientes negotiatores Dagoberti regis interficere iussit et regia expoliavit pecunia. Quod cum comperit Dagobertus rex, misit exercitum suum et damnum, quos ei idem Samo fecit, vindicare iussit.*

[72] Vö. Fredegar, *Chronica* 4, 48. (Ed. Krusch, B. MGH SS rer. Merov. 2. Hannover, 1888.) *Anno XXXX regni Clothariae homo nomen Samo natione Francos de pago Senonago plures secum negutiantes adcivit, exercendum negucium in Sclavos coinomento Winedos perrexit.*; 4, 68. *Eo anno Sclavi coinomento Winidi in regno Samone neguciantes Francorum cum plure multetudine interfecissent et rebus expoliassint, haec fuit inicium scandali inter Dagobertum et Samonem regem Sclavinorum. ... Cum haec Dagoberto nunciassit, Dagobertus superveter iubet de universum regnum Austasiorum contra Samonem et Winidis movere exercitum.; Gesta Dagoberti I. regis Francorum 27. (Ed.* Krusch, B. MGH SS rer. Merov. 2. Hannover, 1888.) *Eo igitur anno Sclavi cognomento Winido, quorum regnum Samo tenebat, negotiatores Francorum cum plurima multitudine interficiunt et rebus expoliant. Cumque haec Dagoberto regi nuntiata fuissent, ilico iubet de universo regno Austrasiorum contra Samonem et Winidos movere exercitum.*

[73] About the sources see Szádeczky-Kardoss: *op. cit.* 171. sqq.

[74] Cf. Pohl: *op. cit.* 256. sqq.; Lošek 1997. 31. sq.; Goll, J.: Samo und die karantanischen Slaven. *Mitteilungen des Instituts für österreichische Geschichtsforschung* 11 (1890) 443. sqq.

Both in the narrative on Ingo's feast and in Fredegar's description pagans not baptised yet are called dogs.[75] In Fredegar's work Sicharius, the delegate lodging a complaint because of massacring the Frankish legates tells Samo that *"non est possebelem, ut christiani et Dei servi cum canebus amiciciam conlocare possint"*; in turn using the same phrases Samo replies: *"Si vos estis Dei servi, et nos Dei canes, dum vos adsiduae contra ipsum agetis, nos permissum accepimus vos morsebus lacerare."* On the other hand, at this point the author of the *Conversio* knowing and using Fredegar's works switches aspects in the narrative quite peculiarly; while in the *Conversio* Ingo orders unbaptised lords to the door, in Fredegar's work Samo, the duke has the Frankish legate, the Christian Sicharius cast out: *"Aegectus est Sicherius de conspectum Samonis."*

Without continuing to investigate prefigurations, the Ingo story narrated in the *Conversio* can be confidently considered, as it were, a part of the missionary catechism drafted as the product of the policy of Christianising the Slavs and the Avars in the age of the Carolingians.[76] In this form it continued to exist for centuries, and was adopted by Iohannes Victoriensis in 14th c. and Enea Silvio Piccolomini in 15th c., who appreciated it as representative example of early medieval mentality.

VII. The original source of the narrative on duke Ingo described in chapter sixty-five of *De Europa* by Enea Silvio Piccolomini is chapter seven of the work entitled *Conversio Bagoariorum et Carantanorum* written in 870. Enea Silvio most probably knew and used the *Conversio* since in his work entitled *Historia Bohemica* he refers to Methodius's operation in Moravia in such form that presumes knowledge of chapter twelve of the *Conversio* written with quite peculiar (tendentious) depiction. The author of this paper has been able to

[75] Fredegar, *Chronica* 4, 68. *Eo anno Sclavi coinomento Winidi in regno Samone neguciantes Francorum cum plure multetudine interfecissent et rebus expoliassint, haec fuit inicium scandali inter Dagobertum et Samonem regem Sclavinorum. Dirigensque Dagobertus Sycharium legatarium ad Samonem, paetens, ut neguciantes, quos sui interfecerant aut res inlecete usorpaverant, cum iusticia faceret emendare. Samo nolens Sicharium vedere, nec ad se eum venire permitteret, Sicharius vestem indutus ad instar Sclavinorum, cum suis ad conspectum pervenit Samonem ... Sicharius dicens: 'Non est possebelem, ut christiani et Dei servi cum canebus amicicias conlocare possint.' Samo a contrario dixit: 'Si vos estis Dei servi, et nos Dei canes, dum vos adsiduae contra ipsum agetis, nos permissum accepimus vos morsebus lacerare.' Aegectus est Sicharius de conspectum Samonis.*

[76] Löwe, H.: *Die karolingische Reichsgründung und der Südosten. Studien zum Werden des Deutschtums und seiner Auseinandersetzung mit Rom.* Forschungen zur Kirchen- und Geistesgeschichte 13. Stuttgart, 1937. 119. sqq.; 170. sqq.

establish that Ingo was referred to in the *Conversio* not as a duke; and both the grammatical analysis of the text and the relevant entry in the *Liber confraternitatum* of Salzburg allowed to draw the conclusion that Ingo was the head of the missionaries in Carantania commissioned by Arn in the period between 785 and 799. His "existence" as duke was owing to a translation/interpretation error, which can be found first in Iohannes Victoriensis's *Liber certarum historiarum* written in the early 14th c.–later, this erroneous interpretation was borrowed by the literature for several centuries, and led to attempts to identify duke Ingo with some known historical person.

The story of Ingo's feast, beside biblical parallels, shows similarity, among others, with Fredegar's *Chronica*; however, the author of the *Conversio* was not an obedient copier of Fredegar; he integrated the sample borrowed from him resourcefully in the series of parabolic catechisms of missions created as the product of the policy of the Christianisation of the Slavs and the Avars of the period. The fact that Enea Silvio also writes about Ingo as the duke of Carantania/Carinthia can be probably attributed to the knowledge and adoption of the tradition kept up by Iohannes Victoriensis, and to the interpretation of the text of the *Conversio* on the grounds thereof–there is little chance for a humanist from Italy to come to the same erroneous interpretation independently from the author from a period more than a century before; therefore, he must have known Iohannes Victoriensis's work. The difference in value of unbelievers and believers appears unambiguously in all of the narratives as the duality between outdoors and indoors, being admitted and cast out. The reference to dogs can be no longer found in Enea Silvio Piccolomini's and Iohannes Victoriensis's works; although in Fredegar's work it can be identified, it is not related to the parable of the feast–from among the texts included in the scope of this investigation, these motifs are united only in the *Conversio*.

The sentence in the *Conversio* giving account of the people obeying Ingo, who enjoyed great authority, even if he had sent them no more than a blank parchment, or unfilled out charter/charter sample *(carta sine litteris)* might have posed problems of interpretation to Enea Silvio and Iohannes Victoriensis since it organically related to early medieval German legal practice–that is why this element was not included in either in *De Europa*, nor *Liber ceratrum historiarum*. The findings so made might to a modest extent contribute to a better understanding of the use of sources by the great humanist, Enea Silvio Piccolomini on the one hand; and to exploring the history of impacts produced by early medieval texts in the Age of Humanism, on the other.

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KALEIDOSCOPE

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Law is Hell: Death and the Afterlife in American Lawyer Jokes

"The first thing we do, let's kill all the lawyers."
(*William Shakespeare*, Henry VI, Part 2)

1. Introduction

a) Background of Research

In the early 1980s, a new joke cycle appeared in the USA, and has continued to flourish ever since. This is a lawyer joke cycle. Lawyer jokes have been published in book form,[1] and have also been displayed on various American websites. According to a 1997 Internet search by a legal journalist 3 473 sites were devoted to lawyer jokes,[2] while only 17 sites displayed jokes about salesmen, 39 sites accountant jokes, and 227 sites doctor jokes. Theo Meder explains the sharp increase of lawyer jokes in recent years by the high legalization of American society. He stresses: "the quantity of lawyer jokes equals the rise of the number and the social status of lawyers, the excessive wages of top-lawyers and their sky-high compensation claims."[3] According to his opinion, this cannot be the only reason for such an expansion of lawyer jokes.

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[1] To name just a few, see Wilde, L.: *The Official Lawyers' Joke Book*. New York, 1982; Knott, B.: *Truly Tasteless Lawyer Jokes*. New York, 1990.

[2] Yas, D. L.: First Thing We Do Is Kill All the Lawyer Jokes. *Massachusetts Lawyers Weekly*, 1997, 20 October, 11.

[3] Meder, Th.: Tales of Tricks and Greed and Big Surprises: Laymen's Views of the Law in Dutch Oral Narrative. *Humor–International Journal of Humor Research*, 21 (2008) 448.

"There are feelings of discontent about the impenetrable logic of justice, but above all the dominant 'vulture culture' of *suing*, *claiming* and *cashing*, as exposed in the news media."[4] Christie Davies even goes further, stating:

> America is government not by men but by lawyers... Lawyers lie at the very heart of American society. American lawyers are the most American of Americans, and they represent the central American values of social mobility–as opposed to entrenched and inherited distinctions–and entail– due process and procedure as opposed to personal discretion and, of course, the pursuit of money. The lawyers *are* the very essence of what it means to be an American.[5]

As Marc Galanter points out, before 1980, the vast majority of jokes about lawyers dealt with topics such as "lawyers corrupting discourse, fleecing clients, fomenting strife, fraternizing with the devil, and compromising justice."[6] The jokes which have added to the corpus since 1980 were joined by "a new set of themes – jokes about lawyers as morally deficient, as betrayers of trust, as objects of scorn, and as desirable candidates for extermination."[7] According to Galanter, almost two thirds of the jokes which have added to the corpus since 1980 belong to these "new wave" categories.[8]

The aggressive tendency in jokes has been known of at least since publication of Sigmund Freud's essay, "Wit and Humor in the Unconscious"[9] in 1905, and has also been discussed by many humor researchers. Hostility towards law and lawyers has been a widespread phenomenon for a long time throughout the world. Grant Gilmore in "The Ages of American Law" stresses: "In most societies at most periods the legal profession has been heartily disliked by all non-lawyers: a recurrent dream of social reformers has been that the law should be (and can be) simplified and purified in such a way that the class of lawyers can be done away with. The dream has never withstood the cold light of waking reality."[10] The book entitled "Devil's Advocates: The Unnatural History of Lawyers"[11] has shown a terrible scorn heaped on lawyers throughout human

[4] *Ibid.* 449.

[5] Davies, Ch.: American Jokes about Lawyers. *Humor... op. cit.* 373.

[6] Galanter, M.: The Great American Lawyer Joke Explosion. *Humor... op. cit.* 390.

[7] *Ibid.*

[8] *Ibid.*

[9] Freud, S.: *Jokes and Their Relation to the Unconscious*. New York, 1960 [1905].

[10] Gilmore, G.: *The Ages of American Law*. New Haven, 1977,

[11] Roth, A.-Roth, J.: *Devil's Advocates: The Unnatural History of Lawyers*. Berkeley, 1989.

history, and has even questioned the reasons why civilization has put up with lawyers at all. This compilation of negative anecdotes about lawyers from early times to the present includes numerous passages from the Bible, from literature, and, moreover, from the mouths of lawyers themselves. In 1911 the following humorous definition of a lawyer appeared: "LAWYER, n. One skilled in circumvention of the law."[12] This definition has been quoted in many legal books. The famous quotation "The first thing we do, let's kill all the lawyers" by William Shakespeare[13] has provided fruitful soil for endless transformation, as in the titles of newspaper articles about lawyers, e.g. "First Thing We Do Is Kill All the Lawyer Jokes",[14] "Modest Alternative to Killing All Lawyers",[15] The hostile titles of some books of jokes or cartoons about lawyers also speak for themselves, e.g., "Dead Lawyers and Other Pleasant Thoughts";[16] "Truly Tasteless Lawyer Jokes".[17] The perennial criticism of attorneys is illustrated as "amoral [...] guns for hire".[18]

Why is it the lawyer, and not the representative of any other profession or occupation, who is permanently made fun of in so many American jokes? What are the dominant stereotypical traits of a lawyer? What negative features is he hated for? Does the lawyer's stereotype in American lawyer jokes contain any truth? These and many other questions could be asked in the regard to American lawyer jokes.

b) Organization of the Study

The present study focuses on two large segments of American lawyer jokes: jokes dealing with lawyers' extermination; and the place where lawyers go after they die. The study is divided into two parts. The first part of the study makes an attempt to analyze jokes, the butt of which is lawyers as candidates for removal from society or, more frequently, extermination. Different ways through which such extermination can be reached are discussed and exemplified. The second part of the study examines Hell as a place lawyers generally go to

[12] Bierce, A: *The Devil's Dictionary*, 1911, see http://www.dict.org/bin/Dict

[13] William Shakespeare: Henry VI, Part 2.

[14] Yas, D. L.: First Thing We Do Is Kill All the Lawyer Jokes. *Massachusetts Lawyers Weekly*, 1997, 20 October, 11.

[15] Miller, R. R.: A Modest Alternative to Killing All Lawyers. *Wall Street Journal*, 1991, 28 October, p. A16, Col. 3.

[16] Miller, D. W.: *Dead Lawyers and Other Pleasant Thoughts*. New York, 1993.

[17] Knott, B.: *Truly Tasteless Lawyer Jokes*. New York, 1990.

[18] Horrigan, B.: *Adventures in Law and Justice: Exploring Big Legal Questions in Everyday Life*. Sydney, 2003.

after their death. All the jokes quoted and discussed in the study can be found with references to their Internet sources. The vast majority of jokes were collected from hundreds of websites in spring 2009.

2. Ways of Exterminating of Lawyers

The focus of our attention in this part of the study is on jokes which offer to remove lawyers from society, or even more frequently, to exterminate them. Different ways of such eradication will be discussed and exemplified here.

Quite a lot of texts suggest *drowning* as the proper fate of lawyers:

> "Do you know how to save a drowning lawyer?"
> "No."
> "Good!"[19]

> If a lawyer and an IRS[20] agent were both drowning, and you could only save one of them, would you go to lunch or read the paper?[21]

> What do you call 5000 dead lawyers at the bottom of the ocean?
> A good start![22]

> How do you save a drowning lawyer?
> Take your foot off his head.[23]

[19] http://www.ravnwood.com/archives/005647.php

[20] International Revenue Service (IRS) is the United States government agency responsible for tax collection and tax law enforcement.

[21] http://jokes.smashits.com/view-6697-if_a_lawyer_and_an_irs_agent_were_both_drowning_an.html

Many of the question-answer American lawyer jokes quoted in this study have taken patterns from American racist jokes. Observe just two examples:

What do you call 20,000 black people at the bottom of the ocean?
A good start. (http://www.blackjokes.net)
How do you get a black man out of a tree?
A: Cut the rope. (http://www.blackjokes.net)

[22] http://www.funnyandjokes.com/lawyer-q-and-a.html

[23] http://www.momsoftco.com/jfile/lawyers.txt

Drowning lawyers is not the only way to exterminate them: American lawyer jokes suggest that there is more than one way to kill a lawyer. Let's observe some texts suggesting *hanging* or *cutting* attorneys:

> How do you know if a lawyer is well-hung?
> When you can't fit your fingers between the rope and his neck.[24]

> What's the difference between a lawyer and an onion?
> You cry when you cut up an onion.[25]

Another popular way of lawyers' removal from society is *killing them in a road accident.* They might be *run over and hit by a car or bus:*

> How many lawyers does it take to stop a moving bus?
> Never enough.[26]

> What do you do if you run over a lawyer?
> Back over him to make sure. Then, make another notch on the steering wheel.[27]

As hard as it might be to imagine lawyers walking down the road, it is almost impossible to imagine lawyers taking a bus, but anything might happen in a joke. Therefore, the following two texts describe lawyers' deaths while taking a bus. In the first one a *bus load of lawyers runs off a cliff:*

> Good News: A busload of lawyers ran off a cliff. The bus was destroyed and there were no survivors.
> Bad News: There were three empty seats.[28]

The second joke shows a slightly different way of exterminating lawyers. First of all, a *bus load of lawyers runs off the road* and crashes into a tree, causing the death of many lawyers. Moreover, the lawyers who were not killed in the crash are *buried alive.* Besides containing a clear anti-lawyer sentiment and hostility towards attorneys (what can be more cruel and inhuman than burying

[24] http://www.lawsongs.com/lawyer_jokes.html
[25] http://www.swapmeetdave.com/Humor/Lawyer.htm
[26] http://www.kaila.pl/humor/lawyers.htm
[27] http://jokeparty.com/
[28] http://www.terry.co.uk/jokes01.html

someone alive?!), the following joke also stresses the idea that all lawyers are inveterate liars, and, therefore, they should not be believed or trusted under any circumstances:

> A bus load of attorneys were driving down a country road when all of a sudden the bus ran off the road and crashed into a tree in an old farmer's field. The old farmer, after seeing what happened, went over to investigate. He then proceeded to dig a hole and bury the attorneys.
>
> A few days later, the local sheriff came out, saw the crashed bus, and then asked the old farmer, "Were they all dead?"
>
> The old farmer replied, "Well, some of them said they weren't, but you know how them attorneys lie."[29]

Here is one more joke about burying attorneys alive:

> What do you have if three lawyers are buried up to their necks in cement? Not enough cement.[30]

Lawyers could also be exterminated by *being eaten*, as the following two texts recommend. The anti-lawyer joke below expresses the fantasy of eliminating lawyers by feeding them to a pet, and employs a very popular technique of eliciting humor in jokes, punning, by playing on two different connotations of the word "serve":[31]

> A man walks into a bar with a crocodile and asks "Do you serve Lawyers here?"
>
> "We sure do", the bar tender answered. "Good", the man says "I'll have a beer and my croc will have a lawyer".[32]

When the man from the text above entering the bar with a crocodile asks if they serve lawyers, we interpret his question as if lawyers, similarly to people of other professions and occupations, are allowed to consume in the bar; and we might even presume that he is a lawyer himself. And the bartender, naturally,

[29] http://www.101funjokes.com/attorney-jokes.htm

[30] http://www.answerbag.com/q_view/307855

[31] This kind of punning is called homonymy. The word "serve" according to Webster Dictionary has more than twenty different meanings, see *Webster's New Universal Unabridged Dictionary*: Deluxe 2nd ed., 1983, 1658.

[32] http://www.fords-solicitors.co.uk/solicitors/news.cfm?ID=6

gives him a positive reply. He obviously thinks the word "serve" is used in the following connotation: "to provide (customers or users) with goods or services".[33] Indeed, why should there be any discrimination of lawyers? Why shouldn't they be served? When we hear, however, the response of the customer ordering a lawyer for his crocodile, we realize that he is not a lawyer; contrarily, he hates lawyers, and what he means by his question is not whether lawyers are allowed to consume in the bar, but whether lawyers (as a meal) are served there, i.e., the word "served" is used in a different meaning: "to prepare and offer (food, etc.) in a certain way to others".[34]

One could also get rid of lawyers by *shooting* them, as the following two jokes (or variants of the same joke) suggest.

In the first text we are recommended, while stranded on a desert island, to shoot a lawyer twice instead of shooting Adolph Hitler and Attila the Hun:

> If you are stranded on a desert island with Adolph Hitler, Attila the Hun, and a lawyer, and you have a gun with only two bullets, what do you do?
> Shoot the lawyer twice.[35]

Thus, the joke above states that the lawyer is more dangerous than Attila the Hun (the Emperor of the Huns from 434 until his death in 453 remembered in much of Western Europe as the epitome of cruelty and rapacity) and Adolph Hitler (one of the most brutal and devastating leaders in the history of the world, on the soul of whom there were endless atrocities and crimes, including the genocide of six million Jews).

The second text, although in a slightly different setting, and with different personages (a room instead of a desert island, and instead of some of the most dangerous and brutal people in the history of the world the personages are a tiger and a rattlesnake), contains similar anti-lawyer sentiment, and follows a similar scenario. In the same vein as the previous text, this joke also recommends shooting the lawyer twice, and draws a parallel between the lawyer and the rattlesnake (a venomous snake, the bites of which are very often fatal) and the tiger (one of the largest predators in the world). According to the text, the lawyer is considered to be even more dangerous than the tiger or the rattlesnake, animals very few people would like to be anywhere near:

[33] This connotation is listed in Webster under N 7, see *Webster's New Universal Unabridged Dictionary:* Deluxe 2nd ed., 1983, 1658.

[34] This connotation is listed in Webster under N 9, see *ibid.*

[35] http://www.funnyandjokes.com/lawyer-q-and-a.html

> You're trapped in a room with a tiger, a rattlesnake and a lawyer. Your gun has only two bullets. What should you do?
> Shoot the lawyer. Twice.[36]

The following text suggests lawyers should be exterminated by *being used in medical experiments* instead of rats. Similarly to the rat–a vicious, unclean, and parasitic animal,[37] spreading disease, and associated in people's minds with aggression, war, and death, a pest which has to be exterminated–the joke[38] below suggests that lawyers should also be in need of eradication:

> The National Institute of Health has announced that it will no longer be using rats for medical experiments. In their place, they will use lawyers. They have given three reasons for this decision:
> 1. There are now more lawyers than there are rats.
> 2. The medical researchers don't become as emotionally attached to the lawyers as they did to the rats.
> 3. No matter how hard you try, there are some things that rats won't do.[39]

The fact that in deciding which (lawyers or rats) should be used for medical experiments (that is, be vivisected), clear preference is given to lawyers, indicates that similarly to rats lawyers are just pests which American society should remove. The three reasons[40] for such a preference are quite forthright, and don't need to be further explained. The joke is also a clear manifestation of the retaliation of doctors (as well as scientists, and laboratory workers involved in medical experiments). One of the reasons for such revenge might be the fact that in American society, doctors are nowadays frequently sued by attorneys (for malpractice).

In the same vein as the famous anti-lawyer statement, "The first thing we do, let's kill all the lawyers",[41] the following two texts also have fantasies about destroying all lawyers in the world. The first text suggests that they could find

[36] http://wilk4.com/humor/humorm353_lawyers.htm

[37] For more on the lawyer as animal in American lawyer jokes, see T. Litovkina, A.: The Lawyer as Animal in American Lawyer Jokes. *Ügyészek Lapja*, 16 (2009) No. 3–4 (in press).

[38] One can find dozens of variants of this joke on different websites.

[39] http://www.terry.co.uk/jokes01.html

[40] Some websites give even more reasons for such preferences.

[41] William Shakespeare: *op. cit.*

their end on the equator, merely *being laid* there, "end to end". No violence is needed, but the heat and the Sun will do their duty:

> If you laid all of the lawyers in the world, end to end, on the equator – It would be a good idea to just leave them there.[42]

Another way of exterminating every lawyer in the world, through *removing their kidneys*, even at the expense of one's own health (losing one kidney), is clearly expressed in the following text:

> A man walking along the beach found a bottle. When he rubbed it, lo and behold, a genie appeared.
>
> "I will grant you three wishes," announced the genie. "But there is one condition. I am a lawyer's genie. That means that for every wish you make, every lawyer in the world gets the wish as well–only double."
>
> The man thought about this for a while. "For my first wish, I would like ten million dollars," he announced.
>
> Instantly the genie gave him a Swiss bank account number and assured the man that $10 000 000 had been deposited. "But every lawyer in the world has just received $20 000 000," the genie said.
>
> "I've always wanted a Ferrari," the man said. "That's my second wish."
>
> Instantly a Ferrari appeared. "But every lawyer in the world has just received two Ferraris," the genie said. "And what is your last wish?"
>
> "Well," said the man, "I've always wanted to donate a kidney...".[43]

The joke below recommends getting rid of lawyers by *defenestration*:

> A Russian, a Cuban, an American and a Lawyer are in a train. The Russian takes a bottle of the Best Vodka out of his pack, pours some into a glass, drinks it, and says: "In USSR, we have the best vodka of the world, nowhere in the world you can find Vodka as good as the one we produce in the Ukraine. And we have so much of it, that we can just throw it away...". Saying that, he opens the window and throws the rest of the bottle thru it. All the others are quite impressed.
>
> The Cuban takes a pack of Havana's, takes one of them, lights it and begins to smoke it saying: "In Cuba, we have the best cigars of the world:

[42] http://www.jk9.com/lawyer_humor.htm

[43] http://www.resourcesforattorneys.com/lawyersgeniejoke.html

> Havana, nowhere in the world there is so many and so good cigar and we have so much of them, that we can just throw them away...".
>
> Saying that, he throws the pack of Havana's thru the window. One more time, everybody is quite impressed.
>
> At this time, the American just stands up, opens the window, and throws the Lawyer through it...[44]

As we know from our life experience, the more you have something, the less you appreciate it. And *in case of American lawyers, their high quantity naturally leads to the wish to get rid of them*, as the joke above suggests. Similarly to the enormous amount of vodka Russians might boast about, or the excess of cigars Cubans are proud of, Americans might brag about the abundance of lawyers they have. Interestingly, everybody in the joke above is quite impressed when the unfinished bottle of the Best Vodka, or the unfinished pack of Havanas are thrown away, but nobody shows any surprise, sorrow or sympathy for the lawyer, when he is thrown away through the window. For the American passenger it is not even necessary to boast about the best lawyers in the world or about their great numbers. He assumes that everyone is familiar with these facts. He simply throws the lawyer through the window: no explanation is needed. Indeed, as statistics show, during 1980s the US experienced not only a dramatic increase in the number of lawyer jokes, but also in the number of lawyers. Thus, the number of lawyers in the United States has grown from 285 000 in 1960 to over one million at the beginning of the 21st century.[45] Even before the American lawyer jokes' explosion in the eighties, it was observed: "We already have at least 10 times as many lawyers as any rational society can tolerate, which doubtless accounts for the triumph of irrationality in American life."[46]

As we know from our real life, terrorists often threaten to kill hostages. In the text below, however, their threat is quite opposite: to "release one lawyer every hour". Naturally such a statement can be a real threat only because there are too many lawyers in America, and they are the object of great scorn:

> A group of terrorists burst into the conference room at the Ramada Hotel where the American Bar Association was holding its Annual Convention.

[44] http://www.101funjokes.com/funny_lawyer_jokes_4.htm

[45] Carson, C. N.: *The Legal Needs of the Public: The Final Report of a National Survey*. Chicago, 2004.

[46] Baker, R.: Terminal Jurisprudence. *New York Times*, 1977, 20 March, sec. 6, 12.

More than 500 lawyers were taken as hostages. The terrorist leader announced that, unless their demands were met, they would release one lawyer every hour.[47]

There is a group of lawyer jokes which are about *lawyers' deaths, but don't mention what has been the reason of it*, as in the texts below. The following text stresses that lawyers are such desirable persons to kill that even a criminal who has murdered a lawyer is given only three days of prison sentence for his crime (quite a symbolic punishment for a murder!):

Two prisoners are talking about their crimes:
George: "I robbed a bank, and they gave me 20 years."
Herman: "Hmm. I killed a man, and I'm here for 3 days."
George: "WHAT??? I rob a bank and get 20 years; you kill a man and get 3 days???"
Herman: "Yeah, it was a lawyer."[48]

Mr. Spenser, in the text below, is so happy and excited to hear the news about the death of his ex-wife's lawyer (one can imagine how outrageous and devastating someone's hatred towards one's ex-spouse's lawyer might be in America!) that he wants to hear this 'wonderful' piece of news repeated, calling a law firm reception again and again:

A law firm receptionist answered the phone the morning after the firm's senior partner had passed away unexpectedly. "Is Mr. Spenser there?" asked the client on the phone.

"I'm very sorry, but Mr. Spenser passed away last night", the receptionist answered. "Can anyone else help you?"

The man paused for a moment, then quietly said, "no" and hung up.

Ten minutes later, he called again and asked for Mr. Spenser, his ex-wife's lawyer. The receptionist said, "You just called a few minutes ago, didn't you? Mr. Spenser has died. I'm not making this up." The man again hung up.

Fifteen minutes later, he called a third time and asked for Mr. Spenser. The receptionist was irked by this time. "I've told you twice already, Mr. Spenser is dead. He is not here! Why do you keep asking for him when I say he's dead? Don't you understand what I'm saying?"

[47] http://wilk4.com/humor/humorm353_lawyers.htm
[48] http://www.ahajokes.com/law067.html

> The man replied, "I understand you perfectly. I just like hearing you say it over and over."[49]

When in the joke below a report of a lawyer's death in a local newspaper appears to be a mistake, such piece of news is corrected later with the greatest expression of sorrow. The sorrow, however, refers not to the fact of printing false information of the death of the town's oldest practicing lawyer, but to the fact that the news of his death was a mistake (quite a big difference!):

> A local newspaper mistakenly printed an obituary for the town's oldest practicing lawyer. He called them immediately and threatened to sue unless they printed a correction.
>
> The next day, the following notice appeared, "We regret that the report of Attorney Critchley's death was in error."[50]

According to a number of jokes, the *cemetery* is one of the best places a lawyer might be found:

> Where can you find a good lawyer?
> In the cemetery.[51]

> Why should lawyers be buried 100 feet deep?
> Because deep down, they're really good people.[52]

Many more jokes containing further fantasies about dead lawyers, or about their eradication from society could have been discussed here, and exemplified by hundreds of jokes, but we have to make a point here.

As Davies states: "Lawyers are very rarely attacked by clients or those they encounter in their work; the risks they face on a daily basis from the violent and the hostile are far less than those encountered by police officers, firemen, social workers, school teachers, and doctors and nurses treating accident and emergency cases."[53] According to his opinion, attorneys' chances of being persecuted or dispossessed in America are simply zero; "the existence of such jokes in widespread circulation in America is an indication of how safe

[49] http://www.comedy-zone.net/jokes/laugh/lawyers/law007.htm
[50] http://www.swapmeetdave.com/Humor/Lawyer.htm
[51] http://www.wakelydam.com/lawyers.html
[52] http://www.nerdtests.com/jokes.php?id=1621
[53] Davies: American Jokes about Lawyers. *Humor... op. it.* 382.

American lawyers are, for the jokes neither evoke the general unease nor the hysterical accusations of bad taste that would be aroused if American lawyers really were hated and menaced".[54] Jokes such as the ones quoted and analyzed in this part of the study are "a perfect example of how jokes that seem to have a viciously hostile content can be full of sound and fury yet signifying nothing".[55]

Fred Rodell calls the law "an unnecessary and expensive nuisance".[56] He also points out: "The answer is to get rid of the lawyers and throw The Law with a capital L out of our system of laws".[57] Negative feelings against the legal profession are also epitomized by the following quotation: "If all lawyers were hanged tomorrow (...), we'd all be freer and safer, and our taxes would be reduced by almost a half".[58] Galanter states that the wish to live in a world without attorneys is "an enduring dream of making language transparent, eliminating ambiguity, and dispensing with the need for interpretation".[59]

I would like to finish the first part of my study with Galanter's words:

> Americans, who regard the rule of law as a defining and essential quality of their society, don't want to be rid of law, but of "lawyers' law"–of formal, complex, "artificial" law that only lawyers can understand. If only, it is fondly believed, we were rid of these lawyers we could return to a better law–simple, natural, direct and understandable. Lawyers are seen as obstacles interposed between us and harmonious natural state of social order.[60]

3. After Death, Lawyers Go to Hell

While the first part of the study has discussed the different ways of exterminating lawyers offered in American lawyer jokes, the second part of the study focuses on the following question: What awaits lawyers after they die? The vast majority of jokes treating the lawyer's end sarcastically show that, after

[54] *Ibid.*
[55] *Ibid.*
[56] Rodell, F.: *Woe Unto You, Lawyers!* New York, 1939, 245.
[57] *Ibid.* 249.
[58] H. L. Mencken, quoted in Rodgers, M. E. (ed.): *The Impossible H. L. Mencken.* New York, 1991, 286.
[59] Galanter: *op. cit.* 404.
[60] *Ibid.* 403.

death, lawyers go to Hell. Some lawyer jokes on various websites are even grouped under the heading "Lawyers in Hell".[61] This is consistent with some old English legal proverbs, sayings and comparisons: "Few lawyers die well", "Fair and softly as lawyer go to heaven", "The devil makes his Christmas pies of clerks' fingers and lawyers' tongues", etc.[62] A very frequent scene of lawyer jokes is at the *entrance to Heaven*, a place where almost no lawyers get accepted, due to their plentiful sins. In spite of this, *some lawyers try to get entrance to Heaven*, and attempt to negotiate with St. Peter, but they almost never succeed.

The joke below takes place at the entrance to Heaven. A dead lawyer is treated by St. Peter with seemingly great respect and warmth. The lawyer can't really understand why all the attention and warm greeting is given to him. The punch line of the joke, St. Peter's reply ("Well, I've added up all the hours for which you billed your clients, and by my calculation you must be about 193 years old!"), however, makes us understand the reason for such 'respect'. Without any doubts, this lawyer, for all his cheating, a stereotypical trait[63] of lawyers in jokes will not get admittance to Heaven either:

> A lawyer died and arrived at the pearly gates. To his dismay, there were thousands of people ahead of him in line to see St. Peter. To his surprise, St. Peter left his desk at the gate and came down the long line to where the lawyer was, and greeted him warmly.
>
> Then St. Peter and one of his assistants took the lawyer by the hands and guided him up to the front of the line, and into a comfortable chair by his desk.
>
> The lawyer said, "I don't mind all this attention, but what makes me so special?"
>
> St. Peter replied, "Well, I've added up all the hours for which you billed your clients, and by my calculation you must be about 193 years old!"[64]

Again, it is the lawyer who goes to Hell in the following joke. The setting of it is also at the gate to Heaven. A lawyer who has committed hundreds of sins in his life, nevertheless, wants to get acceptance to Heaven:

[61] As for example, on the following site: http://www.lifeisajoke.com/miscellaneous17_html.htm

[62] For more on English legal proverbs, see Bond, D. F.: English Legal Proverbs. *Publications of the Modern Language Association*, 51 (1936) 921–935.

[63] See T. Litovkina, A.: Greed, Lies and Negotiable Justice: Stereotyped Lawyers in American Lawyers Jokes. *Acta Ethnographica Hungarica*, 55 (2010).

[64] http://nationaljoke.com/home/tag/lawyer/

A lawyer is standing at the gates of Heaven and St. Peter is listing his sins:

1. Defending a large corporation in a pollution suit when he knew the company was guilty.
2. Defending an obviously guilty murderer because the fee was high.
3. Overcharging clients.
4. Prosecuting an innocent woman because a scapegoat was needed in a controversial case.

The list goes on for quite a while. The lawyer objects and begins to argue his case. He admits all these things, but argues, "Wait, I've done some charity in my life also." St. Peter looks in his book and says, "Yes, I see. Once you gave a dime to a panhandler and once you gave an extra nickel to the shoeshine boy, correct?" The lawyer gets a smug look on his face and replies, "Yes!" St. Peter turns to the angel next to him and whispers, "Give this guy 15 cents and tell him to go to Hell."[65]

Despite hearing all his sins listed by St. Peter, the lawyer tries to negotiate and argue (we know that lawyers are good negotiators!). He says that he has done some charity in his life as well, and he hopes it will help him to get acceptance to Heaven. When, however, St. Peter finds in his book the amount of money the lawyer gave to charity (a dime to a panhandler and a nickel to a shoeshine boy!), we cannot keep our laughter. To call a dime or a nickel 'charity'? Only a cynical lawyer could name such breadcrumbs "charity". Measure for measure: in return for his two extremely 'generous' deeds, the lawyer is given his money back (15 cents), and afterwards is sent to Hell.

Hell turns out to be fairly conventional setting for showing lawyers after their death. The following joke shows how some 'lucky' lawyers might be 'tortured' in Hell:

A man was sent to Hell for his sins.

As he was being taken to his place of eternal torment, he saw a lawyer making passionate love to a beautiful woman.

"What a rip-off," the man muttered. "I have to roast for all eternity, and that lawyer gets to spend it with a beautiful woman."

Jabbing the man with his pitchfork, the escorting Satan snarled: "Who are you to question that woman's punishment?"[66]

[65] http://www.jacksonlawoffices.com/Jokes

[66] http://www.lectlaw.com/files/fun09.htm

While the beautiful woman is being punished for some terrible sins (maybe for adultery or for promiscuity?!) by an eternal torment–to have sexual intercourse with a lawyer, such punishment, however, might be quite a delight and not a torture for the lawyer (sic!). Naturally, if tortures like this are what is expected in Hell by lawyers for their sins, no wonder they commit so many sins.[67]

Jokes might simply *allude* to *Hell*, without even mentioning the word. Although the scene of the following joke is a hospital ward and not Hell, nevertheless it might be proper to quote and analyze it here:

> As the lawyer woke up after surgery, he asked, 'Why are all the blinds drawn?'
>
> The nurse answered, "There's a big fire across the street, and we didn't want you to think the operation was a failure."[68]

The lawyer waking up after an operation is surprised to see the blinds are drawn. At first we might not understand why the nurse would care about the big fire outside, as well as its relevance to the patient. The nurse's answer, however, alludes to a popular belief that for their numerous sins, after death lawyers go to Hell. And since lawyers themselves, better than representatives of any other profession, know about their miserable fate, therefore, the operated patient should not be frightened by seeing the big fire outside. If he saw it upon waking up after the operation, he would think that his operation has not succeeded and, therefore, he has died and is in Hell. Thus, proper precautions have been made by the nurse, i.e., the blinds have been drawn. Although a great number of American jokes demonstrate the permanent fight between lawyers and doctors (as well as other medical personal including nurses and medical researchers), in this joke, on the one hand, the thoughtful nurse tries to save her patient's life, and on the other hand, her answer, in a hidden form, still shows a popular belief that Hell is the place where lawyers go after they die. Thus, this joke pours more oil on the fire of hatred and scorn directed towards lawyers.

According to a number of American lawyer jokes, lawyers associate with the Devil. It would be very hard for God, in the following joke, to find a lawyer in Heaven, unless it's a decent, honest lawyer from the last joke in the study (the category which hardly ever exists, according to jokes[69]):

[67] See Litovkina: Greed, Lies and Negotiable Justice... *op. cit.*

[68] http://www.lawlaughs.com/hell/index.html

[69] See Litovkina: Greed, Lies and Negotiable Justice... *op. cit.*

> God decided to take the devil to court and settle their differences once and for all. When Satan heard this, he laughed and said, "And where do you think you're going to find a lawyer?"[70]

Many jokes discussed above point out that lawyers normally don't enter Heaven: after death they go to Hell. Exception, however, might only prove the rule. Let me finish the second part of the study with a joke about *the first lawyer who has ever entered Heaven*. It might be symbolic that the lawyer in the joke is accompanied by no-one else but by the Pope:

> Following a distinguished legal career, a man arrived at the Gates of Heaven, accompanied by the Pope, who had the misfortune to expire on the same day. The Pope was greeted first by St. Peter, who escorted him to his quarters. The room was somewhat shabby and small, similar to that found in a low grade Motel 6 type establishment.
>
> The lawyer was then taken to his room, which was a palatial suite including a private swimming pool, a garden, and a terrace overlooking the Gates. The attorney was somewhat taken aback, and told St. Peter, "I'm really quite surprised at these rooms, seeing as how the Pope was given such small accommodations."
>
> St. Peter replied, "We have over a hundred Popes here, and we're really very bored with them. We've never had a lawyer."[71]

Undoubtedly, all decent lawyers who get further acceptance to Heaven will be treated by St. Peter with similar respect.

4. Conclusion

As it has been discussed in the first part of the study, quite a serious segment of American lawyer jokes express fantasies of lawyers being eradicated. There is more than one way to kill a lawyer in American lawyer jokes: dozens of ways have been demonstrated through which such extinction can be achieved, e.g., through drowning, burying alive, hitting by car or bus, running off a cliff, cutting, shooting, eating, using in medical experiments, laying on the equator, removal of kidneys, defenestration, and many others. In fact, many jokes also encourage killing lawyers by emphasizing that such murder will not be punished

[70] http://www.scroom.com/SCROOMtimes/Humor/Lawyer.shtml
[71] http://www.kinseylaw.com/JOKES/jokes.html

severely. The attorneys' sins discussed elsewhere[72] contribute to the existence of quite a large segment of jokes about Hell as the only place lawyers go after death, which has been the topic of the second part of the study. Although quite a number of lawyers go to the entrance gates to Heaven and try to negotiate and argue with St. Peter, very few of them are accepted to Heaven. Those few who are lucky to enter Heaven are, however, carried in St. Peter's hands, and treated with the highest respect and admiration.

Acknowledgement

The idea to write the present study came to my mind after reading a book "A jog humora" [The Humor of the Law],[73] as well as after preparing an interview with the editor of the book, associated professor of law, Hungarian lawyer Csaba Fenyvesi about humor in Hungarian legal system.[74] I would like to express my thanks to Csaba Fenyvesi for such inspiration. I also owe much gratitude to David Karla for his friendly help in proofreading the study, his critical comments, and suggestions.

[72] See Litovkina: Greed, Lies and Negotiable Justice... *op. cit.*

[73] Fenyvesi, Cs.: *A jog humora* (The humour of law). Pécs, 2003.

[74] T. Litovkina, A.: Aki a humort szereti, rossz ügyvéd nem lehet? (Interjú Fenyvesi Csaba ügyvéddel *A jog humora* című kötetről) [Who lowes humor, cannot be a bad attorney? (An interview with Csaba Fenyvesi attorney about the volume entitled *The humor of law*)]. *Ügyészek Lapja*, 16 (2009) 87.

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BOOK REVIEW

Boytha Györgyné (ed.): **Versenyjogi jogsértések esetén érvényesíthető magánjogi igények** (Private enforcement of competition law). HVG-ORAC, Budapest, 2009. 329 pp.

"Private enforcement" of competition law is generally understood to cover all the legal steps that a victim of an anti-competitive conduct (be it a world-wide market sharing cartel or an individual instance of unfairly high pricing by a dominant company) may take under civil law. The term, which is generally used as the opposing pair of "public enforcement" of competition law (namely the legal steps by public authorities to investigate and sanction anti-competitive conduct), has become a kind of a "philosopher's stone" for those writing about current trends in competition law. One will find the phrase in almost every book, article or comment published recently on competition law matters: even competition agencies now regularly put a notice on private enforcement into their press releases about major decisions.

Despite all these extensive efforts, there has been very few instances– especially in the Hungarian legal literature and concerning Hungarian civil law –, where the reader (an academic or an attorney wishing to give up-to-date advice to its client) received a clear and instructive picture as to the legal situation concerning this important topic. This book was designed precisely to fill this loophole: its structure and method of analysis are perfectly fit to provide a comprehensive overview taking each of the most important issues in turn that a Hungarian civil lawyer may face when assessing a possible private enforcement claim in Hungary. The book is divided into nine chapters: in addition to the helpful introduction, it analyses, in particular, the following topics: what are the possible civil law heads of sanctions? How can the claimant quantify the damages suffered? How will the causal connection be established between the infringing conduct and the damages suffered? Who can initiate a damages claim (individual parties or even consumers collectively)? These (and further equally relevant) questions receive an adequate and very well researched answer in each and every chapter.

The book and its individual articles are, however, not entirely without flaws. First, the book is also not entirely consistent as to the precise focus of

its analysis: the introductory chapter first discusses–when delineating the subject of the book–the "two ways of enforcing claims deriving from antitrust rules" (21.) (meaning private and public claims stemming from infringements of the prohibition of anti-competitive agreements and of the abuse of a dominant position), while the same chapter latter also brings the breach of the rules of unfair competition (eg individual boycott) and the breach of the Hungarian Act on Commerce into the equation (29–31). In addition, Chapter 2 (under the title: "competition law infringement–civil law sanctions...") extensively deals with the unique and highly interesting subject of the enforcement of commitment decisions; even though, despite the title of the chapter, a commitment decision by an antitrust authority clearly does not result in a finding of competition law infringement by the authority. Second, although the quality of the articles is consistently very high, the depth and length of the legal analysis varies and in certain instances without due reason. Therefore, for example, the highly important and controversial topic of calculating the quantum of damages (that is highly relevant for any Hungarian lawyer or judge dealing with a future private enforcement case) receives less than half of the pages used for the issue of multiple damages in the USA. Although this latter topic may indeed be rather exotic, it is clearly the latter that would have deserved a better coverage from the perspective of the Hungarian reader [especially considering that multiple damages are not expected soon in civil law system due to the deep rooted principle of prohibition of profiting from damages ("káronszerzés tilalma")].

Even with the minor shortcomings stated above, the new book on private enforcement can be considered as a pioneer in its genre. The collection of articles and essays provides immense value to the reader in all respects: it is extremely useful both for those wishing to merely to quickly look up a single practical aspect when they feel "lost" in the jungle of a private enforcement case and also for those who use the book as a basis for further research (especially in light of the consistent and detailed footnotes as well as the bibliography at the end of the book providing further stepping stones for law students, professors or researchers). Although the publication will certainly not be sufficient in itself to create the philosopher's stone on the Hungarian legal market and turn the country into a virtual goldmine of private enforcement, it clearly seems that the authors have already mastered quite a number of important steps of alchemy towards the completion of the desired element.

Zoltán Marosi

CORRECTION

The correct title of the article published in Acta Juridica Hungarica, June 2009. p. 145 is the following: by Dániel Deák "Legal autopoiesis theory in operation–a study of the ECJ case of C-446/03 *Marks & Spencer v. David Haley*". The editors apologize everybody concerned, the author and the readers as well.

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DÁNIEL DEÁK*

Conflicts between Hungarian Procedural Tax Law and Community Law–Case Studies**

Abstract. In this paper, the administrative law aspect of the compatibility of the Hungarian local trade tax will be discussed, based on the presumption that even if it has been declared that the Hungarian local trade tax cannot be considered inconsistent with the harmonised value added tax, Hungarian taxpayers may be hurt in their rights if they cannot get easy access to the clarification of the legal issue whether a national tax is consistent with Community law.

Keywords: enforcement of compatibility with harmonised value added tax of Hungarian local trade tax; state liablity of the damage caused by wrong legislation; taxpayer claims based solely on the infringement of Article 10 EC

In the following, procedural tax law issues will be raised through case studies. Their subject is the Hungarian local trade tax. It was tested before the ECJ whether the Hungarian tax was not in competition with the harmonised value added tax. A number of Hungarian taxpayers claimed that it was not. Although their claims were not approved by the ECJ, the question cannot be confined to the substantive law issue. This is because not only the question can be formulated if the Hungarian tax is consistent with Article 33 of the Sixth Council Directive (now Article 404 of Directive 2006/112/EC), but another question as well. The latter is of procedural law nature. The smooth operation of the harmonised value added tax can be jeopardised not only by introducing

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taxes in competition with the value added tax as introduced by the Sixth Council Directive. It can also be an impediment to the smooth operation of the harmonised value added tax that taxpayers cannot easily clarify whether a national tax as introduced is consistent or not with the harmonised value added tax. Taxpayers may be compelled–as the case is in Hungary–to undertake to file tax returns with zero tax liability, and envisage the adverse tax consequences of identifying the unpaid tax, if they wish to express their doubts as to the national tax as introduced, whether it is compatible with the harmonised value added tax. This is because they do not have the right in Hungary to file tax returns with the right of reservation. This can be seen, taken by itself, as a breach of the loyalty principle as enshrined in Article 10 of the EC Treaty.

In the following, the administrative law aspect of the compatibility of the Hungarian local trade tax will be discussed, based on the presumption that even if it has been declared that the Hungarian local trade tax cannot be considered inconsistent with the harmonised value added tax, Hungarian taxpayers may be hurt in their rights if they cannot get easy access to the clarification of the legal issue whether a national tax is consistent with Community law. First, the above question will be put in the context of a lawsuit of public administration, the subject of which is to examine whether the resolution of the local tax authorities on the imposition of the advance local trade tax is lawful. Secondly, the problem with the inconsistency of local trade tax with Community law will be extended to the possible delictual liability of the state for the damages caused by the introduction of tax not duly levied, that is, by the legislation not consistent with Community law. Again, even if the controversy on the compatibility of the local trade tax has been over, the question has remained open if the Republic of Hungary can be sued under certain conditions for compensating the damages caused by wrong legislation.

I. Examining the legality of levying local business tax in the context of Community law

1. Background

According to one viewpoint, a legal case can be brought against the bureau chief of the Public Administrative Office of the County of Zala as defendant, petitioning the Court to review a decision he signed in 2005, which let stand a warrant for payment issued by the Mayor's Office of the Municipality of Zalaegerszeg. The applicant may contend that he was correct to petition the Court to declare that decisions produced by the defendant were violating the

law, because as of May 1, 2004, when the Republic of Hungary joined the European Union, Paragraph 129 (1) of Article 33 of the Sixth Council Directive 77/388/EEC[1] became directly available to the applicant, and thus the applicant had no liability for the relevant tax. Consequently, it was not in accordance with the law to prescribe the applicant the obligation to make an advance payment connected to the 2005 tax year.

The applicant moved to initiate a preliminary ruling proceeding in front of the European Court of Justice, for–among other objectives–to get an interpretation of whether the local business tax (in Hungarian: "helyi iparűzési adó") can be upheld following accession, or whether it conflicted with Article 33 of the Sixth Council Directive.[2] Another issue that was raised was whether 3(a) [on Local authority fiscal aid] of Part 4 [on Competition Policy] of Appendix X of the EU Accession Treaty[3] could be interpreted in such a way that the accession document granted a temporary waiver (i.e. one that is limited to a term of transition) to the Republic of Hungary, which would provide the option that Hungary may–if it so chooses–derogate from the rule allowing only a single kind of turnover tax in any Member State–an otherwise mandatory requirement derived from Article 33 of the Directive. Following an appeal, the Zala County Court [of Hungary] referred to the European Court of Justice for a preliminary ruling, which was registered under C-283/06.[4] Since another reference with similar aim and content was submitted by the Supreme Court

[1] 77/388/EEC, Official Journal L 145, 1977.06.13. 1 (amended multiple times). Without prejudice to other Community provisions, especially general Community provisions in force on the holding, transporting, and controlling of goods subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges, which cannot be characterized as turnover taxes, given that these taxes, duties, or charges do not trigger formal requirements in connection with the crossing of borders.

[2] According to the ECJ, it cannot. The local business tax is this not in conflict with Community law. Joined cases C-283/06 Közgáz and C-312/06 OTP Garancia Biztosító, European Court Reports, 2007, I-8463.

[3] Notwithstanding Articles 87 and 88 of the EC Treaty, Hungary was allowed to apply, up to and including 31 December 2007, local business tax reductions of up to 2% of the net receipts of undertakings, grantable by a local government for a limited period of time on the basis of Articles 6 and 7 of Act C of 1990 on Local Taxes, as amended by Article 79 (1) and (2) of Act L of 2001 on the Amendment of Fiscal Laws, as amended by Article 158 of Act XLII of 2002 on the Amendment of Acts on Taxes, Contributions, and Other Budgetary Payments.

[4] Official Journal C 212, 2006.09.02. 23.

of Hungary (which was registered under C-312/06), the president of the European Court of Justice ruled that the two cases be joined.[5]

Tax authorities that produced the original decisions generally prescribed in their warrant for payment that taxpayers make an advance payment of the local business tax administered via the taxpayers' local business tax account. The authorities generally founded their decisions on Paragraph (1) of Section 39 and Paragraph (2) of Section 41 of the Local Taxation Act. The public administrative agencies of second instance handling the case on appeal let the original decisions stand–as they were deemed to be correct in terms of their substance–in all cases involving Hungary. The decisions produced in the appellate proceedings were supported by the reasoning that the [Hungarian] local business tax was examined in detail as part of accession talks, and Hungary could have received the right to uphold the waivers and allowances until December 31, 2007 as part of 3(a) [on Local authority fiscal aid] of Part 4 [on Competition Policy] of Appendix X of the EU Accession Treaty. Considering the fact that the accession document does describe the institution of the local business tax (tax base, taxation rate), the public administrative agencies of second instance hold that this tax should be considered as one that would be sanctioned by the European Union as well, taking into consideration that there is no Community norm that would render the levying of this kind of tax forbidden.

Taxpayers can petition to have the official decisions changed or abrogated. They can rely on the argument that the decisions violate certain legal rules, as the obligation to pay the local business tax expired after April 30, 2004. Consequently, as of May 1, 2004 rules connected to the local business tax that are found in the Local Taxation Act can no longer be used, and in the absence of local business tax law liability, the taxpayer has no obligation to file a tax report, make an advance or regular payment connected to this tax. The taxpayer applicants may also move for the proceedings to be suspended considering that for the petition to be adjudicated the interpretation of Paragraph (1) of Article 33 of the Directive is necessary. The applicant may found his legal action that since the local business tax–which is regulated in the Local Taxation Act–is considered to be a form of turnover tax, its upholding by the Republic of Hungary has been in conflict with Paragraph (1) of Article 33 of the Directive since Hungary's accession to the European Union, i.e. since May 1, 2004, because the accession document did not contain any temporary waiver that would have enabled Hungary to maintain reliance on this form of tax.

[5] Official Journal C 327, 2006.09.30. 6.

The interpretation of Community law is necessary, because if 3(a) [on Local authority fiscal aid] of Part 4 [on Competition Policy] of Appendix X of the EU Accession Treaty can be interpreted in such a way that the fact that it contains waivers connected to certain options of granting allowances related to the local business tax until December 31, 2007, then this may imply that the parties have also recognized the waiver to apply to the underlying institution of local business tax itself until that day. However, if the case is that the temporary waiver contained in the accession document does not in fact apply to the institution of the local business tax form itself, then it remains open to interpretation, whether–in light of the rule contained in Paragraph (1) of Article 33–a tax is considered to be a forbidden form of turnover tax based on its relevant material characteristics, if its subject is the entrepreneur, if its scope covers all entrepreneurial activity (literally: conducting trade/economic activity, i.e. the literal meaning of the name of this tax is the tax levied on conducting trade/economic activity) conducted within the territory (i.e. jurisdiction) of the local government, in other words: all activities conducted by the entrepreneur in this particular capacity that is directed at acquiring profit or income.

The questions raised (in case No. C-312/06) by the Supreme Court [of Hungary] are to be answered individually, one by one, in other words, the national judicature would definitely like to get an answer to the question if Article 33 of the Sixth Council Directive is in fact a block in the way of upholding the aforementioned national tax. The Metropolitan Court of Budapest (in case No. C-447/06, which has by now been removed from the register[6])–similarly to the question raised by the Zala County Court–also determined a hierarchical order. Accordingly, the procedural law question could only be answered in light of the outcome of the derogation and substantive law deliberations. This approach is questionable, because the procedural matter could be examined in and of itself. The reason for this–in our opinion–is that it can be considered a violation of Community law in and of itself if the public administrative authority handling the case refuses to examine whether the national tax is reconcilable with Community law, thereby forcing the taxpayer to correct his/her tax return via self-auditing, i.e. indirectly prescribing him/her a more difficult task (because this task is laden with the threat of sanctions connected to the potential finding of delinquent taxes), thereby blocking the true coming into force of Community law.

The finding of violation of procedural law may qualify as a violation of Community law–and with it a connected finding of liability on part of the

[6] Official Journal C 326, 2006.12.30. Removed from the register: Official Journal C 096, 2007.04.28. 29.

Member State related to a violation perpetrated by way of legislation is possible–even if in terms of the substantive law issue (namely: "Is the local business tax reconcilable with the set Community order of value added taxation?") we could determine no finding of violation of Community law. The issue of the possible lack of reconcilability can be raised not only in general terms, based on the requirement of loyalty contained in Article 10 of the European Community Treaty, as apparent from the way the question was framed by the Metropolitan Court of Budapest. A violation of Community law on part of a national authority, or that of national law actually means the violation of Article 33 of the Sixth Council Directive, because the issue of reconcilability of national taxation with harmonized value added taxation can only be raised in a proceeding that by its nature presents a burden for the taxpayer. The prohibition contained in Article 33, according to which Member States are barred from introducing a national tax not reconcilable with harmonized value added taxation, can only be fully functional, if at the same time citizens are guaranteed the opportunity for Community law violations to be recognized (identified) without any disproportionate burden before national authorities, and similarly their connected rights are freely exercisable in actuality.

2. Impediment to the enforcement of Community law

The local business tax is of a hybrid nature: it is based on self-assessment tax payment [Paragraph (1) of Section 25 and Paragraphs (1)–(2) of Section 26 of the Act on the Rules of Taxation], but also has the proceeding of an official authority ending with a decision inserted into the process of self-assessment taxation. The warrant for payment describing the amount of tax advance to be paid is the product of an official proceeding, and according to Section 123 of the Act on the Rules of Taxation, the payment order qualifies as an authoritative decision, which produces a result directly connected to the significant material subject of the tax related case, therefore the option of petitioning for a review of the legal issues connected to the case must be guaranteed for the client without any limitation. The authority of second instance violates the law if it declares that it has no capacity to rule whether the original mode of levying the tax was lawful or not. The fact that according to Paragraph (5) of Article 41 of the Local Taxation Act[7] the tax authority determines the amount of the tax advance to be paid based on the annual tax report filed by the taxpayer, does not lead to the conclusion that the tax authority is released from the

[7] The tax authority issues a warrant for payment to communicate the amount of tax advance to be paid, determined based on the annual tax report or the reporting of projected tax.

obligation to examine the legal issues connected to producing a decision that declares the imposition of the tax. This is so, because Paragraph (1) of Section 31 of the Act on the Rules of Taxation[8] contains guidance relevant to the content of a tax report, according to which the document contains data necessary for both the determination of the tax, and that of the (legal) foundation of the budgetary support, and its sum.

According to Paragraph (3) of Section 41 of the Local Taxation Act, if the base or rate of the tax changes due to a change made in a legal rule, then the public administrative authority must determine the new sum of the tax advance by taking into account the updated formula and/or rate of the given tax. In the previously mentioned litigation, this is exactly what was observed: a change in the legal rule occurred, effective on the day of accession, specifically: the incompatible Hungarian rule (requiring the payment of the local business tax, which is irreconcilable with the harmonized value added taxation system) was replaced directly by the Community legal rule, and in truth this should have been noticed by the public administrative authority handling the case, and accordingly, the authority should have declared the expiration of the obligation to pay this tax.

Considering that the taxpayer applicant initiated legal proceedings directed at challenging the legality of the tax liability [citing Paragraph (3) of Section 41 of the Local Taxation Act in support of applicant's claim] and also challenging the base and rate of the tax [citing Paragraph (1) of Section 31 of the Act on the Rules of Taxation], the tax authority may not decline to take a position in the connected legal debate, which is an issue otherwise independent from the declarations provided by the taxpayer in taxpayer's annual tax return. In this aspect it is also irrelevant that the production of the decision was not preceded by a tax administrative proceeding. If the tax authority becomes aware of the violation of Community law resulting from the change in the legal rule, it must initiate the abrogation of legal rules establishing the obligations connected to the local business tax. As a result of this, the taxpayer status in this respect will cease to exist, since the taxpayer is defined as the person who has a liability for tax, and this status is, on the other hand, defined by a piece of legislation currently in force [namely: Paragraph (1) of Section 6 of the Act on the Rules of Taxation].

If the public administrative authority was to produce a decision only regarding the numerical issue [of size], then there would not even be need for a decision that determines rights and obligations. However, as part of the process

[8] The tax report contains data necessary for determining the identity of the taxpayer, the tax base, exemptions, reductions, and the amount and basis of budget support.

of producing a decision, the authority may not decline to take the responsibility of forming an opinion of its own regarding the legitimacy of the legal basis for levying the relevant tax, especially if such a close examination is expressly requested by the taxpayer. According to the law, the public administrative authority is understood to be producing a formal decision even by the mere act of exercising its power to issue an official certificate or identification/registration document, or when deciding as registrar to enter someone into an official registry under its administration. If the taking of responsibility for deciding underlying legal issues cannot be avoided even in these more routine and mundane situations, it is certainly unavoidable in cases connected to levying taxes, even if in this particular case we are only faced with the issue of fixing the size of an advance payment of tax based on self-reporting.

The position of the authority, according to which the decision declaring the levying of the tax contains no obligation beyond that of the numerical definition of the tax liability, can be considered erroneous. On the one hand, according to Paragraph (1) of Section 42 of the General Rules of State Administrative Procedure Act (Áe.) [no longer in force, as replaced by Ket.] or Paragraph (1) of Section 71 of Public Administrative Procedure and Services Act (Ket.), the authority produces a decision in cases of merit, on the other hand, the adjudication of the merits of the case cannot happen without producing a decision. The decision produced by an authority has to contain not just the statements of facts, but has to also cover the legal foundation of the decision. When producing an authoritative decision, the public administrative authority handling the case may not refuse to conduct the task of examining the lawfulness of setting an obligation contained therein. If the taxpayer chooses to challenge the public administrative decision declaring the taxpayer's obligation to be liable for taxes levied, then the lawfulness of the liability for taxes cannot be determined just by examining whether the taxpayer did in fact file a return and with what content, but in certain situations the review should also cover the examination of the question whether the legal rule supposedly serving as the foundation of the tax reporting is in fact valid or not. This latter examination is independent of the question of whether or not the taxpayer challenges the tax connected to his or her tax report.

If the taxpayer applicant launches a legal challenge regarding the lawfulness of the liability for a given tax, then the taxpayer's intention is not to minimize the risk of being in error, rather the taxpayer wishes to avoid the lack of the rule of law, without having to suffer certain adverse consequences (undue burden) should the decision in the case eventually go against him/her. But this is exactly the situation the taxpayer is forced to be faced with in such a tax administrative system, where one cannot file a tax report with reservation.

If the public administrative authority of second instance takes the position that it can only conduct an examination of the lawfulness of the local business tax if the taxpayer files a return in conjunction with the taxpayer claiming that the local business tax is not in harmony with Community law, then the authority forces the taxpayer to take the risk of initiating a legal challenge with the threat of sanctions hanging over his/her head connected to the possible finding of delinquent taxes. This conduct of the authority results in the taxpayer being seriously harmed in exercising his/her rights granted by Community law.

The taxpayer applicant's such conduct cannot be deemed unlawful nor can it he/she be considered to be acting in bad faith, and neither can the taxpayer's tax report be considered baseless, unless such circumstances are confirmed by a final ruling in the given case by a public administrative authority having appropriate power and jurisdiction. Since no such instance could be detected, there could be no doubt that applicant's conduct concerning the matter forming the subject of the lawsuit was lawful. Had the defendant had certain questions about the lawfulness of the tax liability, then it would have had the chance to, for example, suspend the public administrative authoritative proceeding, and then it could have proceeded to resolve the underlying issue. Even though the applicant moved specifically requesting the authority to do just that, the defendant refused this motion. If the defendant simply takes, duly notes, and processes the applicant's tax report without any special consideration, then the defendant's conduct can be considered unlawful, if–at the same time–it fails to examine–even as a self-assigned task, by default, on its own volition–whether the relevant legal rules are in fact in force, and whether the liability for taxes forming the basis for the tax report is in fact in accordance with the law.

Naturally, the subject of the proceeding does not get rendered obsolete, nor can the proceeding be terminated even in the presence of the taxpayer's such positive declaration, or similar positive act (as the filing of an annual tax report), which results in the actual payment of taxes. In a public administrative authoritative proceeding it is an obligation of the authority–either by request or in its official capacity, by default–to guarantee lawful law application, and to support the enforceability of the law, including that of Community law. The authority's obligation to render an authoritative decision regarding the lawfulness of the liability for tax is prescribed by law, with no regard to the filing of a tax report for a given tax year. If the taxpayer chooses to challenge the public administrative decision declaring the taxpayer's obligation to be liable for taxes levied, then the lawfulness of the liability of taxes cannot be determined just by examining whether the taxpayer did in fact file a return and with what content, but in certain situations the review should also cover the examination of the question whether the legal rule supposedly serving as the

foundation of the tax reporting is in fact valid or not. This latter examination is independent of the question of whether or not the taxpayer challenges the tax connected to his or her own tax report.

The defendant public administrative authority may argue that it had examined the legal issues raised by the taxpayer, and conclusions connected to the underlying legal issue were appropriately represented in the opinion. However, since the defendant public administrative authority of second instance took the position that the local business tax was in fact not irreconcilable with Community law, it ruled against the petitioner taxpayer. The public administrative authority merely mentioned in passing in its decision as a possibility, that the applicant taxpayer may correct his or her tax report via self-auditing (by submitting a zero return). If this in fact does take place, then the public administrative authority may conduct an examination in the form of a tax administrative proceeding that covers the lawfulness of the local business tax. However, in view of the defendant authority it (the public administrative authority) is bound during the review of the decision prescribing the payment of tax advance to the tax report filed, and that is why it cannot declare, in contrast with the tax report, that the taxpayer has no liability for local business tax.

Thus, in view of the public administrative authority, the opportunity is open to examine the question of lawfulness of the local business tax only if the taxpayer corrects his/her tax report by way of a self-audit (i.e. by filing a zero return). This is a procedure of the authority, which equals the violation of the taxpayer's rights protected by Community law, and one that results in the authority blocking the taxpayer exercising his or her rights. Since as part of the review of the decision containing the payment order, the public administrative authority refused to examine the lawfulness of the local business tax in the way described previously, it was immaterial that, on the other hand, it did refer to the taxpayer's argument as part of the opinion of the decision, and that it also included its related evaluative reasoning, these latter factors have no significance when examining the lawfulness of the authoritative decision. This is so because the authority based its reasoning on the assumption that it is tied by the tax report, and that is why it has no option to examine the lawfulness of the local business tax, and it cannot, by default, reach any conclusions that would be contrary to the tax report. Naturally, it is questionable, however, that the public administrative authority is in fact bound by the tax report, since a public administrative proceeding is inserted into the process of taxation, which produces an authoritative decision. Due to the fact that, as a result of the public administrative authority's destructive stance, the authority's procedure blocks the taxpayer in exercising his/her rights relevant from the perspective of Community law, we observe a violation of Community law–a matter that is

to be examined in and of itself. Therefore, even if the substantive law rules of the local business tax were found to be in harmony with Community law by a national court or the European Court of Justice, the legal violation described above would be reason enough to find that the public administrative decision was unlawful.

Another hypothetical question is raised by the following scenario: the taxpayer files a zero return, but pays the tax anyway, in order to avoid having delinquent taxes. This scenario, however, is not permissible by Hungarian law currently in force, because the correction of data provided regarding the tax or the tax base triggers the obligation to make a corresponding tax payment, since the corrected tax amount becomes due with the filing of the matching report [(1) of Section 51 of the Act on the Rules of Taxation].[9] Thus, it is not possible that a tax payment obligation reported after a self-audit be separated in time from the actual payment becoming due. It is generally true of Hungarian law, that the filing of a tax report and the connected materialization of the obligation to make a tax payment is inseparable from this same obligation becoming due. It is true that overpayment is possible, and the taxpayer may–under certain circumstances–require the refund of the surplus payment [(6) of Section 43 of the Act on the Rules of Taxation],[10] in the albescence of such request, however, the tax authority may cancel the amount of overpayment acting in its own official capacity once the allotted time reserved for such claim has expired [(5) of Section 43 of the Act on the Rules of Taxation].[11] When we claim that the obligation to pay tax becoming due is different from the materialization of the obligation, we are in other words saying that the flow

[9] The amount of corrected tax, the budget support, and the assessed self-auditing extra charge is due at the time of their reporting.

[10] If the taxpayer has no tax debt, the taxpayer may request repayment of the remainder amount. In absence of such express request, the tax authority will treat the excess amount resulting from the overpayment as credit, and will automatically use it toward settling taxpayer's future tax obligation. The local tax authority may return the excess amount only on condition that the taxpayer at the time has no unsatisfied payment obligation of any public charge collectible [to be collected] as tax in its records.

[11] If the taxpayer or the person obliged to pay the tax [(2) of Section 35] paid an amount exceeding the amount that would have correctly been due for the given tax obligation (overpayment), the tax authority shall use the excess amount to settle other taxes due by the same taxpayer according to its records, provided that the taxpayer request such reassignment. Once the legally allotted time has passed for the taxpayer to request a refund, the tax authority automatically reassigns the remainder amount to settle other outstanding tax debt of the same taxpayer on its records, or in absence of such outstanding debt it officially removes it from its records. A tax payment made in error to the wrong bank account of the same tax authority is to be treated as a payment obligation satisfied.

itself of a tax payment and the materialization of the obligation to pay a tax do not necessarily coincide, similarly to how in economic life we see that acts of delivery (of goods) or rendering of services (i.e. e.g. one party fulfilling its contractual obligations) do not necessarily have to coincide with payment becoming due.

An overpayment can reduce the amount of delinquent tax (back tax) [(2) Section 170 of the Act on the Rules of Taxation],[12] but it cannot, on the other hand, have an effect on the finding of tax discrepancy. The tax discrepancy– i.e. the difference between the amount of tax to be paid according to the finding of the tax authority and the amount of tax reported, or the amount omitted from the tax return [3. Section 178 of the Act on the Rules of Taxation][13]–is the category, which has to be in sync with the materialization of the obligation to pay tax, independent of when the payment obligation becomes due, or how much tax had actually been paid already. Since according to Hungarian law currently in force, the reporting of liability for tax on part of the taxpayer cannot be separate from when the obligation to pay becomes due, there is no option to file a tax report without prejudice, furthermore, the taxpayer is even prohibited form exiting the domain of self-assessment taxation and instead request that taxes be assessed by the tax authority. Self-auditing can only be used in case the original tax return was not in accordance with some legal rule or contained erroneous figures or calculative errors.

According to the solidified practice of the European Court of Justice, any legal rule or authoritative practice of national law that can have the effect of weakening the exercise of rights protected by Community law by taking away the liberty of the authority handling a case to do everything in its own power to facilitate the working of Community law, qualifies as a material violation of Community law.[14] According to the view of the European Court of Justice, and the taxpayers registered in the United Kingdom, taxpayers cannot be lawfully forced to request a tax exempt status in relation to the obligation to pay

[12] A tax discrepancy assessed to the taxpayer is to be considered a tax shortfall, but in the case of self-assessment taxation this is true only if the amount of the tax discrepancy was not settled before the time it was due, or if the budget support was taken advantage of. An overpayment existing at the time of the original due date can only be considered as the meeting of the tax payment obligation, if the overpayment also exists on the day of commencement of the audit.

[13] See "tax difference: the difference between tax reported, failed to be reported, or levied/assessed based on reporting, and tax or budget support subsequently determined by the tax authority; or tax revenue deficit found in the final judgement of the criminal court; or budget support taken advantage of without entitlement."

[14] C-118/00 Gervais Larsy v. Inasti, European Court Reports 2001. I-05063. 51.

the advance on corporate tax, triggering the likely reaction of the tax authority, which consequently finds the delinquent taxes and applies the connected sanctions [of penalties or added interest obligation]. While it is true that the decision containing the sanction can be challenged on appeal before a court of law, in view of the European Court of Justice it is a serious block in the way of exercising rights provided by Community law if the taxpayer has to face the probability of the negative decision of the tax authority.[15]

The blocking of the effective use of rights protected in Community law is a serious legal violation in and of itself, therefore this issue can be adjudicated independently of the substantive law issue, moreover, the defendant can be found to be responsible for the violation even if otherwise the local business tax could not be proven to be irreconcilable with Community law. The reason for this is that as part of the original proceeding the applicant requested that the scope of the issues proposed for deliberation in connection with Article 33 include not only the substantive law but the procedural law aspects as well, and found it necessary that the European Court of Justice declare its position regarding the procedural issue as well.

II. Damages caused with legislation (by the local business tax, which violates Community law)

1. Background

According to one possible position based on Paragraph (1) of Section 339. of the Civil Code of the Republic of Hungary (Act No. IV of 1959 as amended; "CC" in the following) it is possible to bring legal action against the Hungarian State as defendant for damages caused with legislation. The applicant's damages equal the amount of local business taxes due since the May 1, 2004 accession of Hungary to the European Union, which were paid according to legally binding public administrative authoritative decisions in due course, but which the taxpayer would not have been obliged to pay had the Republic of Hungary not kept the legal rules in force mandating the payment of the local business tax violating Community law.

The applicant can move to initiate preliminary ruling proceeding for the purpose–among other things–of interpreting if maintaining the local business tax is in conflict with Article 33 of the Sixth Council Directive after accession. The question had also been raised whether 3 a) of Part 4 of Appendix X. of the

[15] Joined cases, Metallgesellschaft, Hoechst, 107.

accession document could be interpreted in such a way that it provides a temporary period of waiver for the Republic of Hungary from the obligation derived from Article 33 of the directive, to maintain only a single kind of tax based on turnover. Another issue raised in connection with the interpretation of Paragraph (1) of Article 33 was whether it is a possibility consistent with Community law that the public administrative authority of second instance declines to examine the reconcilability of the local business tax with Community law, unless the taxpayer files a tax return in such a way that it includes a reference to the supposed lack of valid tax payment liability, thereby taking on the risk of sanctions connected to the finding of delinquent taxes. This is of importance because in this latter scenario the tax authority handling the matter is instrumental in setting the taxpayer on a course of a tax administrative proceeding with an uncertain outcome, which blocks the taxpayer from exercising his/her rights, and consequently impedes the actual functioning of Community law. According to the national court in charge of case No. C-447/06–the Metropolitan Court of Budapest–the applicant's motion to initiate the preliminary ruling procedure (detailed above) had legitimate basis. (The case had been removed by the European Court of Justice from its records, due to the fact that the decision brought at the lower level was later changed on appeal.)

2. Legal basis of the compensation claim

Since the issue (of a compensation claim for damages caused with legislation by a Member State) raised by the applicant's original legal action is of a sort, for which the European Court of Justice has developed a separate standard practice, the need for interpreting Community law is presented by this particular case as well. Simultaneously with filing applicant's lawsuit, applicant first and foremost initiated that the national court produce a preliminary ruling on how to interpret Paragraph (1) of Article 33 of the Sixth Council Directive with respect to the question of whether or not the local business tax kept in force by Hungary following its accession is reconcilable with Community law. Applicant's damages are not only attributable to having had to pay the local business tax–in a way that violates Community law–, but is also connected to the fact that the Hungarian legal system in force failed to produce an environment, where the access to Community rights is not significantly burdensome. For the legal conflict to be resolved, it is necessary to call upon the European Court of Justice to provide an interpretation of Paragraph (1) of Article 33 of the Sixth Council Directive, which deals with harmonized value added taxation. With regard to this, we not only see the question raised whether or not the rules contained in Paragraph (1) of Article 33 of the Sixth Council Directive and

rules governing the local business tax (as per Chapter IV of the Local Taxation Act) are in harmony, but also whether the respondent's position claiming that there is no possibility of changing or ending the obligation to make an advance payment on the local business tax until (and unless) the taxpayer files a corrected tax report based on self-auditing is consistent with Paragraph (1) of Article 33.

The liability of a Member State for damages can be connected technically with the "loyalty clause" of the European Community Treaty (Article 10.). This is exactly the root of the liability of a Member State for violating Community law. We should, at the same time, point out that compensation for damages is the most general form of sanction applied by the European Court of Justice. The reliance on this sanction has implications regarding the entirety of a national legal system, because it can be seen as the most appropriate tool of implementing rights enforcement in a rule-of-law environment and a market economic framework. This is because the prime importance of the sanction of compensation can be explained, first and foremost, by the fact that citizens' rights are protected by law, and the violation of these rights can be interpreted as a financial matter. Consequently, a prerequisite of an compensation claim is the definition of damages in financial terms. The compensation claim is not primarily connected to harm caused to the property or financial holdings of citizens, rather it is viewed as the most generic tool of rights enforcement in case of rights violations. This has a significance in determining liability for damages in individual cases as well, since the civil court charged with protecting the existing legal order has the capacity to rely on the use of compensation claims in any case, in which the court finds the harming of rights in connection with any legal relations.

In connection with the delictual liability of Member States for the violation of Community law, the European Court of Justice has found in the Francovich case,[16] that the comprehensive enforcement of Community legal rules would be impeded if private citizens could not have access to legal redress, if their harm was caused by a rights violation attributable to a Member State. According to the European Court of Justice, the principal, according to which a Member State is liable for damages caused to private citizens by a violation of Community law that is attributable to that state is rooted in the internal system of the Rome Convention. In consecutive years,[17] the European Court of Justice further refined

[16] C-6/90, C-9/90 Andrea Francovich, Daniela Bonifaci & others, combined case, European Court Reports 1991. I-5357, Para. 33.

[17] C-46/93, C-48/93 Brasserie du Pêcheur, Factortame Ltd. & others, combined case, European Court Reports 1996. I-1029, Para. 51.

the criteria of finding delictual liability for national legislation not consistent with Community law, which are the following:

- the piece of Community law at issue was originally intended to give rights to individuals
- he violation of Community law alleged to have been committed by a ber State is significantly harmful
- here is a cause and effect relation between the Member State's failure fulfill an obligation and the harm.

According to the solidified position of the European Court of Justice (C-46/93 Brasserie du Pêcheur, C-48/93 Factortame, Para. 74), the adjudication of the compensation claim is to be carried out by the national courts by way of applying the rules of national law, and the execution of the claim may not be burdensome (efficiency requirement), and the relevant legal rules may not be less favourable than other national legal rules relevant to the adjudication of other (types of) claims for damages (equivalency requirement).[18] An alternative of the compensation claim can be the petition for a restitution claim (C-397/98 Metallgesellschaft, C-410/98 Hoechst, Para. 77). When petitioning for a restitution claim, the applicant need not give proof of the existence of each prerequisite criteria of the compensation claim, and an additional concession providing a lower threshold is that in the context of Community law there is no need to give proof that the violation of Community law was significantly harmful (C-46/93 Brasserie du Pêcheur, C-48/93 Factortame, 56–57). In contrast, however, the scope of the restitution claim is limited relative to that of the compensation claim, in that, for example, disadvantages connected to the harm caused (such as, for example, the weakened position of the enterprise affected by the national legal rule that violates Community law) may not be included in the restitution claim. In Hungarian law, the possibility of petitioning for a restitution claim–as a claim for damages–is possible by referencing Section 6 CC.[19]

Generally, the European Court of Justice, when adjudicating a case, does not tend to get involved in deciding how the object of applicant's petition can be categorized within civil law. This is due to the fact that according to the view of the European Court of Justice, it is a matter belonging to the scope of

[18] See also: C-231/96 Edis, European Court Reports 1998. I-04951. Para. 34. A Member State may reasonably determine a short period available for a [taxpayer] to enforce a claim for the refunding of a payment of a common charge that was assessed unlawfully, which, however, may not make the actual enforcement of rights guaranteed by Community law burdensome (Edis, Para. 35).

[19] The court may oblige a person to pay damages in part or full, whose wilful conduct caused another person acting in good faith to perform an action with good reason that caused him or her harm through no fault of his or her own.

national law, if a particular case is based on an compensation or a restitution claim (C-397/98 Metallgesellschaft, C-410/98 Hoechst, Para. 81, C-446/04 FII Group Litigation, Para. 203[20]). In any case, the applicant's demand may only legitimately include those particular damage items that are directly connected to the damage caused by the Member State's violation of the law. Accordingly, for example, the forgoing of one special tax allowance (in connection with the taking of another tax allowance), or, for example, the paying of an increased dividends payment in order to compensate for the unavailability of a tax allowance are not sufficient grounds for requesting compensation for damages (C-446/04 FII Group Litigation, Para. 207). In the litigation concerning the local business tax, it is clear that the applicant's petition included a restitution claim, referring to the fact that all prerequisite criteria prescribed by Section 339 CC in connection with the finding of liability for damages were present. Furthermore, applicant's claim only covered damage items directly connected to the damage claim (as the applicant's claim covered only the amount paid in taxes that should not have been paid had the Republic of Hungary not demanded this payment in a way that violates Community law, plus the applicant's claim obviously also covers the payment of interest on the amount that had actually been paid by the applicant).

3. Unlawfulness and imputable conduct

Based on the above, we believe that the finding of liability for damages on the part of the Republic of Hungary is well founded. Based on Paragraph (1) of Section 339 CC, there is a legitimate claim against the Hungarian State for the compensation of damages caused by wrong legislation. The taxpayer applicant's damages equal the amount of local business taxes that were due for the period following the date of accession, and which were paid according to the enforceable decision handed down by the authority, but which would not have had to have been paid had the Republic of Hungary not kept these legal rules on the local business tax in force after accession, which has been a violation of Community law. The Republic of Hungary committed a violation of Community law–therefore the liable Hungarian State's conduct is unlawful–by way of keeping in force certain legal rules on local business taxation as part of Chapter IV of the Local Taxation Act, that are not reconcilable with the Sixth Council Directive on harmonized value added taxation. The Republic of Hungary is culpable (her conduct is imputable) in causing the damages, because it failed

[20] European Court Reports 2006. I-11753.

to request derogation regarding Article 33 of the Sixth Council Directive on the uniform structure of value added taxation, and additionally, because it failed to examine with due diligence, whether the maintenance of this tax will result in the violation of Community law following accession.

International practice shows that immunity of the state in developed countries is understood to be a differential matter, where "iure imperii" and "iure gestionis" of the state's jurisdiction are strictly separated. Considerations akin to these were driving the revision of the CC's rules concerning liability for damages, when following the political changes in 1990, rules protecting state immunity were abrogated.[21] With regard to unlawful conduct, the Supreme Court of the Republic of Hungary took the position in a case earlier this decade (Court Ruling 264/2002) that no civil law damage claim can be made in connection with liability connected to the act of passing legislation, because the cause-and-effect relation between the erroneous legislation and the suffering of harm does not produce any detectable civil law relation between the legislator and those who are perceived to have suffered certain negative consequences. The civil court cannot find that the legislator committed unlawful conduct by failing to produce certain legislation, an act challenged for it being allegedly of negative consequences. The court must, however, change its juridical course after accession, since the clear practice of the European Court of Justice has shown that unlawful conduct is understood to be present, even if the violation of Community law occurs by way of legislation.

The Supreme Court arrived at the position (e.g. Court Ruling 312/1994) regarding the liability of legislators, that the damage connected to the enactment of the legal rule, that legislation as an act of producing general and abstract rules of conduct, and the connected liability are covered by the scope of public law, which according to Hungarian law guarantees immunity for the legislators. However, according to the practice of the European Court of Justice, the damage can be understood to be of an individual nature, and any subject of a national law has the capacity to petition for the compensation of damages caused by legislation violating Community law. Should there be no availability of a possibility to do so, this shortcoming of the national legal system would constitute a serious hindrance in the way of the practical enforcement of Community law.

The practical workings of a democratic rule of law state has burst the traditional boundaries of the liability for damages of the state and the viability of connected claims, because according to the traditional framework, legal responsibility could only be found if

[21] 94/V/200. [Hungarian] Supreme Court decision, dissenting opinion, III. 3.

- the damage was caused by a public administrator, by way of violating professional rules of conduct, or failing to fulfill responsibilities ascribed to him or her
- the damage caused can be interpreted as the withholding of advantages available to (individually) separate third persons.

According to Subsection (1) of Section 339 CC, the causing of damages is always unlawful, unless it is expressly lawful. This is a true statement independently of the legal (subject) status of those who have caused the damage. A positive discrimination granted to the state by way of the legal system sanctioning that the state need not necessarily act responsibly (i.e. allowing that it not be held responsible), is in conflict with Section 70/A of the Constitution [of the Republic of Hungary] prohibiting negative discrimination. In the given case we may also be able to infer the abuse of legislative power, the legal source of which is Subsection (1) of Section 2 of the Constitution.

According to the practice of the European Court of Justice, if a Member State violates Community law by way of legislation, it cannot make its legal accountability conditional on the particularities of its division of branches of power. The state's liability for compensation cannot be limited to some state administrative act.[22] In modern legal practice the state's liability for the violation of international or Community law must be perceived as a uniform whole, regardless of the fact whether the violation has occurred in connection with the legislative, the executive branch, or the judiciary (Brasserie du Pêcheur, Para, 34). Citizens cannot be blocked in their ability to enforce their rights or have access to judicial redress if they reference Community law, even if the damage caused is attributable to national legislation violating Community law (Para. 35).

Bringing the state to legal account in connection with damages caused by legislation is possible if

- the legislator of the Member State had a wide range of evaluative (discretionary) power when it introduced the national legislation; there would have been a possibility to carve out individual rights based on the Community right violated, and the violation of Community right is significant; and

[22] C-179/94 Brasserie du Pêcheur, 33; C-188/94, C-189/94, C-190/94 Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor, European Court Report, 1996. I-04845, Para. 29. The obligation of a Member State to indemnify a damage is valid even if the damage occurs because the national court brought a final judgement violating Communnity law, where Community law prescribes rights individually enforceable by citizens. C-224/01 Gerhard Köbler, European Court Reports 2003. I-10239, Para. 59.

– there is a cause and effect connection between the violation of the Community right and the damage caused to citizens.

The responsible Member State must offer legal redress within the framework of its own legal rules. However, these rules cannot be less favorable to the harmed party than those guaranteed in connection with legal violations by the internal rules (of the Community), and under no circumstances can the national rules make the enforcement of these rights disproportionately more difficult (Para. 74).

Stockholm Lindöpark AB sued the Swedish State because until 1997 the latter kept in force a certain value added taxation rule in conflict with the Sixth Council Directive, according to which the letting of immovable property for the purpose of practicing sports is a service exempt from VAT–even if this purpose is amateur sporting activity–, consequently the related 'transferred' tax cannot be deducted. When seeking damages, the taxpayer set its demand for compensation as being equal to the amount of 'transferred' tax (indirect tax shifted to the lessee) it could not deduct during the term between the date of accession of the Kingdom of Sweden (January 1, 1995) and the amendment of the relevant legal rule (January 1, 1997). The Court ruled that due to the fact that the Swedish legal rule was not in harmony with Community law in the two years following the country's accession, the Kingdom of Sweden committed a serious and obvious legal violation by infringing Community law, which is sufficient grounds for finding the validity of the state's liability for compensation.[23]

The damage caused by way of legislation is chargeable to the person causing the damage, because the Republic of Hungary could have asked for the implementation of temporary rules in connection with Paragraph (1) of Article 33 of the Sixth Council Directive, by referring to the local business tax, which it failed to do, even though it did ask for–and was granted–derogation in connection with Paragraph (3) of Article 12 of the same directive (Para. 6 of Part 7 on Taxation of Appendix X. of the accession document). Since the legal debate concerning the local business tax was launched immediately following accession, the Republic of Hungary could have had the opportunity to request a preliminary investigation from the European Committee. However, the Hungarian State causing the damages failed to gather the necessary information, (and this is legally ascribable to it), thereby upholding a state that violates Community law, and has done nothing concrete anyway in order to resolve the issue. Regardless of this, according to the clear practice of Community law, if the condition is present that the damage caused by way of legislation is sig-

[23] C-150/99, European Court Reports 2001. I-00493. 40.

nificant–and in the Hungarian case this is naturally so–the state's liability for compensation for damages cannot even be made dependent on the examination of culpability according to the European Court of Justice (Brasserie du Pêcheur, Para. 80).

Prior to May 1, 2004, the Republic of Hungary categorized the local business tax as a type of value added tax.[24] Despite this fact, the Republic of Hungary failed to reconcile the relationship of the local business tax and the related Community law in any finite manner during accession talks. Hungary did not ask for–and therefore did not receive–derogation for the local business tax in connection with the Sixth Directive. Based on this, its action can neither be considered lawful, nor prudent, and neither can we determine that it was acting in good faith.

The Republic of Hungary decreased the standard rate of the value added tax (áfa) from 25% to 20% by enacting Act No. XCVII of 2005 (see Section 1). However, in order to offset the budget deficit that would have been caused by the independent introduction of this measure, it decided to overrule its previous decision to end the institution of local business taxation. In formal terms this meant that the legislation abrogated Section 190 of Act No. XCIX of 2005–which would have ended local business taxation as of December 31, 2007–by enacting Section 236 of Act No. LXI of 2006, which struck the legal rule that mandated the ending of local business taxation. Considering that the Republic of Hungary viewed the local business tax as one that could be used to supply revenue for the state, which could be expected to balance the budget in terms of the revenue lost due to decreasing the general rate of value added taxation, we may come to the conclusion that the value added tax is in fact comparable to the harmonized value added tax that exists in the European Community.

4. Injury suffered

Although it is normal that the burden of the local business tax, expressed in monetary terms, is passed on to the consumer (or client), this does not mean that the payment of the tax, which violates Community law, did not in fact cause damage to the applicant itself. This is because we must–on the one hand–take into consideration the fact that the financial advantage gained by passing on the financial burden of the tax is not demonstrable by exact calculations, cannot be represented in monetary terms,–and on the other hand–if in fact the tax is a cause of price increase, then this is a cause of decreased competitive-

[24] Opinion of the Ministry of Finance of the Republic of Hungary, May 30, 2002. (No. 6479/6/2002.)

ness, since it is uncertain whether the taxpayer is capable of passing on the damage in a particular case, and if it can, then to what extent and with what conditions attached. Consequently, we cannot demonstrate a direct connection between the general trend of passing on the respective amount of the tax and the potential decrease of the damage on part of the taxpayer (i.e. we cannot come to a well-founded conclusion that the damage caused by the payment of the tax has potentially decreased). The passing on of the tax burden is conditional on several factors, which cannot necessarily be connected to the passing on of the damage. Even if the passing on of the tax does in fact occur, there still remains a question as to what the passing on of the tax is attributable to, because the relevant circumstances can be different from one case to the next.

What we can state as positive fact is that the tax had to be paid and the obligation would not have burdened the taxpayer had the Hungarian State been prudent in its course of action following accession, and thus would have brought its law in line with Community advancements. In this respect, we may also state that applicant's damages are unconditional, singular and countable. It is certain that tax had to be paid. It is uncertain how this burden could have been passed on–if at al–, because it cannot be directly connected to a pecuniary advantage that can be defined in terms of civil law damage liability. This would only be possible, if the tax could in fact be listed as a line item on the invoice, and the tax burden could not be listed as expenditure on the books, (as is the case with the value added tax, where the tax to be paid is not considered to be revenue, and the deductible tax is not considered to be an expenditure). We could only make a well-founded and exact conclusion that the damage is being passed on from the fact that the tax is being passed on if the tax burden existed in a closed system. In this case, however, this is not so, since the calculation of the tax to be paid and the tax that can be deducted cannot be separated in book-keeping terms from how the financial results (revenues and expenditures) materialize.

This latter circumstance does not, as a matter of fact, make it questionable that the tax is materially (practically) transferable to the client, and is thus functionally comparable to the [Hungarian] value added tax [áfa]. In a paradoxical way, in order to compare with the harmonized value added tax, it is only necessary to show that the taxpayer is capable of passing on the tax burden to the consumer (or client)–so long as the base of the tax is the gross revenue–; however the financial advantage gained by the ability to pass on the tax can only be validly shown to exist, if the tax is separable from the system of revenues and expenditures, and can be listed separately on the invoice as well. As a point of fact, it follows from the functional approach to the local business tax that it is theoretically within the realm of possibilities to find the

irreconcilability of the local business tax with Community law even if the local business tax and the harmonized value added tax are not comparable in terms of the transferability of the tax. Consequently, the national court could even reach the conclusion that the local business tax is not transferable, nevertheless, it is not reconcilable with harmonized value added tax. In this case, however, the possibility of mitigating the damage connected to the payment of the tax does not even enter the picture.

The European Court of Justice made a declaration of guiding importance in the San Giorgio case, according to which it is not consistent with Community law–as it is an obstruction in the way of satisfying a damage claim–if a national legal rule contains such protections, or prescribes such rules of evidence, which–when applied–put the burden on the taxpayer to prove that the burden of paying a tax violating Community law could not be transferred to other persons.[25] A national legal rule (necessarily) violates Community law, according to which the rules prescribing indirect taxation themselves could be bases for concluding that the tax is transferable, unless the taxpayer proves the opposite.[26] According to the European Court of Justice, the right to petition for the reimbursement of taxes paid based on taxes levied in violation of Community law is a right organically and inseparably attached to substantive rights guaranteed by national or Community law.[27]

Even if national law makes it possible to transfer (pass on) the burden of a tax (as an indirect tax) to the consumer–and there is in fact a trend to do so in commercial practice–, it is not necessarily possible to presume that this actually does take place in every case. Whether or not the partial or complete transfer does in fact happen can be conditional on a lot of different factors. Consequently, the issue of transferability is an issue of fact, or more precisely the issue of whether the Member State causing damage by way of legislation

[25] 199/82, European Court Reports 1983. 3595, Para. 14.

[26] C-343/96 Dilexport, European Court Reports 1999. I-579, para. 54.

[27] 309/85 Bruno Barra, European Court Reports 1988. 355, Para. 17. The attempt to recover the amount of a tax payment made cannot be blocked by–for example–requiring that the burden of proof rest with the taxpayer in absence of official book-keeping records prescribed by the Accounting Act. C-129/00 Commission v. Italy, European Court Reports 2003. I-14637, Para. 37. Similarly, the fact that a taxpayer commercial enterprise lists the amount to be recovered [via the refunding of tax] among recievables on its balance sheet in the tax year when it paid the tax demanded unlawfully, does not allow the conclusion that the enterprise did so because it passed on the relevant cost to the consumer (Para. 40). It is not reconcilable with Community law if the practice of the competent authorities of a Member State based on this or similar logic makes it burdensome to enforce a claim for the refunding of taxes paid based on an unlawful obligation (Para. 40).

violating Community law is capable of successfully exonerating itself.[28] In contrast to the claim made by the applicant in the case being discussed, the European Court of Justice came to the conclusion that the taxpayer commercial enterprise could decide to bring proof that though the burden of the tax was transferable, yet the inclusion of the tax in the price could have led to the decrease of revenues, which could be considered as an actual loss of the taxpayer. The taking into consideration of this circumstance rules out the possibility of finding financial gain without legal ground on the part of the taxpayer, which is relevant because this could otherwise be grounds for disallowing the execution of the compensation claim (Comateb, Para. 32).

The claim that the size of the damage is equal to the amount of tax that would not have had to have been paid had the national taxation rule not violated Community law is accepted in Community law practice, and this is backed up by the decisions of the European Court of Justice. An analogous example is the decision handed down in the Lindöpark case (C-150/99). Here the Court ruled for the applicant, and decided that the taxpayer applicant's legitimate claim for damages was equal to the transferred tax that could not be deducted in the period between the accession of the Kingdom of Sweden (January 1, 1995) and the amendment of the relevant legal rule some two years later (January 1, 1997). The reasoning was that this damage would not have occurred, if the tax would have been deductible, and had Swedish law been in harmony with Community law by allowing the deduction of the amount of transferred tax, as a result of officially recognizing the relevant taxable activity accordingly. The taxpayer's damages exactly equaled the amount of the non-deductible transferred tax, which the taxpayer could have deducted had the Kingdom of Sweden harmonized its law with the Sixth Council Directive following her accession. Naturally, the damage claim extends to the interest amount as well (Para. 13). The occurrence of the damage–in contrast to applicant's position–did not require further proof beyond the finding that the taxpayer could not take advantage of the possibility to deduct the amount of tax at issue.

In the joined cases of Metallgesellschaft (C-397/98) and Hoechst (C-410/98), the foreign parent companies petitioned for compensation of damages, because dividends paid by their British subsidiaries were subject to the payment of Advance Corporation Tax (ACT) according to British taxation rules, which was in their view a discriminatory measure as the liability to pay the ACT did not exist for holding companies of domestic resident status (Paragraphs 27 and

[28] Joined cases, C-192/95 and C-218/95 Société Comateb, European Court Reports 1997. I-165, Para. 25.

29). The damage caused was determined to be equalling the amount of the ACT deducted from the dividends payments, i.e. the pecuniary disadvantage resulting from the payment of the ACT. The European Court of Justice found for the applicant, providing the reasoning, among others, that the national courts could not have reasonably required as a prerequisite of adjudicating the damage claim that the taxpayer first follow through with its potential legal conflict with the tax authority, in case it chooses to take advantage of the tax allowance available in the domestic context, and turn to the courts for legal redress only if the public administrative proceeding resulting from the legal conflict had ended inconclusively (Para. 107).

5. *Direct causation between the conduct of a Member State violating Community law and the damages that have occurred*

Since the damage occurred as a direct result of having had to pay the tax, which would have been avoidable had the Republic of Hungary repealed the relevant tax law rules following accession, the damages that have occurred could be proven by the applicant presenting as evidence those tax reports that show the existence of the tax payment liability being challenged, as well as the connected proofs of actual tax payments having been made. There is no necessity for presenting separate tax authoritative decisions in connection to proving the existence of the liability for the tax. It is a separate issue that the taxpayer did question the legality (validity of the legal grounds) of the liability to pay the tax at issue, and therefore the taxpayer had challenged the decision of the tax authority prescribing the payment of a tax advance before the courts, petitioning for the dismissal of the tax authority's decision, claiming that it was unlawful.

Naturally, the Hungarian State did not prescribe the applicant's obligation to pay the local business tax, but this obligation could not have materialized had the relevant national rule not been created. Consequently, the direct cause-and-effect relation between the conduct of the person causing the damage and the damage caused is obviously present, especially if we take it into account that in absence of the relevant [national] legislation violating Community law, the local governments [in Hungary] would not have been able to rely on this form of taxation. We would like to note here that in the applicant's case all local governments involved did take advantage of the option to levy the local business tax without any exceptions. Consequently, the damages that have occurred were caused by the legislative act of the Hungarian State. The legal person of the local government could also be involved as co-defendant in the lawsuit (through its mayor's office), on the basis that naturally the municipality's

decree mandating the payment of the local tax is itself in violation of Community law. This would however make no sense, because the capacity of local governments to issue decrees is based on legislative enablement, and the violation of Community law is an issue primarily connected to the erroneous piece of legislation. Action against the local government authority would also be appropriate, and in fact is expected of the taxpayer due to the obligation of the taxpayer to act to minimize the damage. The appropriate way to do this, however, is to petition for the review of the public administrative decision. This was in fact carried out by the applicant on every occasion. The basis for bringing suit against the Hungarian State is that taxpayer applicant's damages occurred as result of the act of enacting legislation that violates Community law. Consequently, applicant cannot limit the applicant's claim to just what would be damages caused while exercising public administrative power. While it is worth mentioning here that the applicant cannot rule out that the Hungarian State did not in fact cause damages while exercising state administrative power (and this is why we may cite Section 349 CC), nevertheless, the proper legal basis for the applicant's claim is Section 339 CC.

III. Concluding remarks

Even though, following the ECJ decision in C-283/06 Kögáz and C-312/06 OTP Garancia Biztosító, it can be concluded that the Hungarian local trade tax cannot be considered inconsistent with Community law, the taxpayer's rights are infringed, being compelled, as a result of the tax authority's failure to interpret the Hungarian law on local trade tax in the light of the respective Community law, to enter into a burdensome procedure. In fact, for the lack of interpreting the Hungarian law on local trade tax in terms of dealing with an appeal the taxpayer made against the tax authority's first-instance decision on the imposition of advance local trade tax, the taxpayer has to file a tax return with zero tax liability and assuming the risk that this return would most likely be challenged by the competent tax authority.

Notably, the problem of Hungarian law has not to date recovered in the instance that the taxpayer is not granted to file tax returns with the reservation of his or her right to challenge the legal basis of the imposition of tax. Where under Hungarian law it is possible that the tax authorities avoid interpreting the compatibility of the Hungarian law on local trade tax in the light of Community law in terms of an appeal the taxpayer may make against the tax authority's first-instance decision on the imposition of advance local trade tax, the question can be raised if the Republic of Hungary has infringed the loyalty

requirement of Article 10 EC by preventing taxpayers from the efficient enforcement of their rights. It is an open issue, however, if a claim against the national legislation of a Member State can be based solely on the infringement of Article 10 EC or, in addition to it, the claimant could be requested to show the infringement of some substantive provisions of national law in association with the alleged infringement of Article 10 EC.

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The Critique of the Ideology Underlying the Slogan "Run like a business"**

Abstract. The paper criticizes the ideology behind New Public Management movement that prefers market to government, private company to public institutions. The study sums up the main arguments of this ideology, based mostly on an overly simplified version of neoclassical economics and attempts to provide a structured inventory of counter arguments. Counter arguments first attack the myth of the general superiority of the market and the firm. Secondly, it is argued that government is different. Thus, even if market and firm were superior these mechanisms still cannot be applied in most parts of government business.

Keywords: Public Administration, government, ideology, New Public Management, effciency, effectiveness, market, economic theory, public choice theory

Introduction: The Subject-Matter and the Method

In this essay I intend to analyse the ideology underlying the slogan "Run like a business" admittedly with a critical sting. Anyone who has dealt with the issues of the state and public administration even if in an oscular manner during the recent two decades, has hardly been able to evade the encounter with the slogan above or the underlying movement of the so-called New Public Management. The essence of the New Public Management generally abbreviated as NPM is that the classical-bureaucratic method of the functioning of the state should be abandoned.[1] Instead, the market mechanism and private companies constitute

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[1] A detailed introduction of NPM is not feasible here. For further orientation: Hughes (2003) provides a typical practical summary of the application possibilities of New Public Management; whereas Perry [Perry, J. L. (ed.): *Handbook of Public Administration*, San

the ideal. According to the underlying philosophy: *The market is always better and more efficient than the state, companies are always more efficient than public administrative organs. More market and less state are always more beneficial for the society.*

The recognition of more abstract theoretical approaches behind NPM as an applied theory pertaining to public administration is not difficult. NPM demonstrates an obvious relation to the conception of neo-liberal-neoclassical economics and generally to mainstream economics, which construes the market as an optimal society-organisational principle.[2] It is the frame of reference and especially the methodological establishment of principles of this economics, i.e., the departure from the rationally acting individual maximising exclusively his/her individual profits that is applied by Public Choice theory, scilicet, the Public Choice Theory to the public sphere and the state. Public Choice has entailed a new approach in the analysis of political relations and within that of the functioning of the state and has reached several significant conclusions.[3] Of course, the departure principally destines the conclusion that the state is less efficient in comparison with the market. In his work quoted several times, Niskanen[4] proved on the basis of the mathematical apparatus of economics that state services do not work efficiently, because they provide larger supply than the market optimum. From a somewhat divergent (otherwise not proved) departure point, but with similar methods Migue–Belanger[5] reached the

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Francisco, 1989] is a scientific and huge volume, which examines all the relevant issues of public administration via the perspective of NPM. Pollitt-Boukaert [Pollitt, Ch.–Bouckaert, G.: *Public Management Reform. A Comparative Analysis.* Oxford, 2000] provides the comparative introduction, analysis and assessment of the public administrative reforms of the recent decades. A short introduction and assessment of NPM techniques is provided by Hajnal [Hajnal, Gy.: Teljesítmény-orientáció a közigazgatási reformokban. Nemzetközi tapasztalatok a második világháború utáni időszakban (Performance Achievement Orientation in Public Administrative Reforms. International Experience in the Period after World War II)]. *Magyar Közigazgatás*, 49 (1999) 289–299, 361–370, 426–435] and with a positive attitude by Horváth, M. T.: *Közmenedzsment* (Public Management). Budapest–Pécs, 2005.

[2] Milton Friedman, the most famous economist of the era can be considered an emblematic figure of this approach. The lengthy entry of Wikipedia dealing with him provides a good summary of his work and thinking.

[3] A good summary in Hungarian is Johnson [Johnson, D. B.: *A közösségi döntések elmélete* (The Theory of Public Choice). Budapest, 1999.] In English Lane [Lane, J.-E. (ed.): *Bureaucracy and Public Choice.* London, 1987.] focuses expressly on the role of the state.

[4] Niskanen, W. A.: *Bureaucracy and representative government.* Chicago, IL, 1971.

[5] Migue, J. L.–Belanger, G.: Toward the General Theory of Managerial Discretion, *Public Choice*, 17 (1974), 27–47.

conclusion that the quantity of state and public services is not, but their prices are higher than the market optimum. That is, they agree that state and public services are not efficient, but they disagree concerning the question in what this manifests itself. In this essay, it is obviously impossible and unnecessary to enter into the introduction of neoclassical economics and Public Choice Theory. Flashing light on the ideal span ranging from theory to practice, from general to concrete state and public administration describable with the formula of "neoclassical economics → Public Choice Theory → New Public Management" (NPM) was necessary, since the ultimate measures of value and the claims of NPM basically follow this span. The critique of ideology needs to examine not so much concrete techniques as the underlying „philosophy".

The acknowledged method and style of this essay is *a critique of ideology*. In this essay, I will examine and criticize the set of ideas underlying NPM. I will grasp this doctrine as an ideology, since I don't intend to deal with it as a scientific paradigm. Since, on the one hand, it is questionable for several reasons, whether it is a paradigm.[6] Since, on the other hand, I do not intend to examine it as a scientific achievement. Namely, in this case generalising statements are always questionable, since differences among authors always obtain. However, I am exclusively interested in the foundational idea by reason of its effect. Namely, the market ideal has basically determined the mentality of recent decades. NPM has been a manifestation of the Zeitgeist with respect to the state. We have witnessed the interesting, however, not unequalled case in history[7] that the conceptions related to the management of the state were determined by an ideology sharply opposed to the state.

The critical approach proceeds remarkably from my personal partiality. As a researcher of public administration, I am partial to the state and I consider its working necessary and useful. The method of ideology criticism, which is without doubt somewhat obscure and has a neo-Marxist overtone, seems to be adequate, since in this context my affirmative bias to the state rather reinforces than diminishes the capacity of the revelation of reality. Namely, following discursive logic, I will attempt below to expose the weak points of the view opposed to mine.

[6] Gow, J. I.–Dufour, C.: Is the New Public Management a Paradigm? Does It Matter? *International Review of Administrative Sciences* (IRAS), 66 (2000) 573–597.

[7] The short initial period of the communist attempt was characterised by such an ideological approach.

In the course of that, *I will dwell on three main subjects*: the idealisation of the market as a general social mechanism, the idealisation of the market as en economic mechanism and efficiency ideal, finally, the idealisation of the corporate as an efficient organisation. (Besides, I will roughly refer to the features of the prevalence of NPM in Hungary.) *In the three cases (a) I will reconstruct the major claims of the ideology pertaining to the market and companies, (b) then I will examine the reality content of these claims in themselves (c) and how these correlate with the state and public administration.*

The Market as an Ideal Social Mechanism

The myth of the market often reaches beyond economy in narrow terms. Below, I will survey these proposals. Such universal virtues of the market are emphasised especially by the so-called Viennese economic school, which at the same time condemns the state-bureaucratic solutions. This circle includes Friedrich Hayek, Ludwig von Mises and partly Joseph Schumpeter. The arguments for the market are summarised especially in the volume "Road to Serfdom" written by Hayek published in 1944. Besides, several neo-liberal economists frame similar thoughts, such as Milton Friedmann.

The market as an original human relation

The functioning of the market is often regarded as a relation, which implies some primeval condition. The natural condition of rational individuals wishing to maximise their profits is competition, exchange and the surmounting market mechanism. In this constellation, the emergence of the state is some perversion, the occupation of an aggressive, but in fact negative entity on a more useful, primeval mechanism.

It is not problematical to realise, however, that the most profitable activity in an economic competition not limited legally or by the state is the skinning of others, since this promises saliently high returns with low costs. From the robbed value, helpers can be hired, relying on whom even more people can be skinned. Therefore, this is the competition of robbers, which will shortly lead to an oligopolistic situation: the reign of some robber barons. If any of the robber barons grasps the power over the others, the state may be established. In this sense, theoretically we may infer that the market was the primary form. It is another issue that judging from history, ancient societies were not characterised by the endeavour to maximise individual profits. Instead, the behaviour was determined by the community and community norms, in which

self-interest and competition were considered deviances disregarding rare exceptions. (On the non-market logic of exchange in pre-modern societies: Bourdieu[8].)

The myth of the invisible hand and the prisoner's dilemma

According to the conception closely related to the above, the genuine great merit of the market mechanism is that it channels the acts of individuals inevitably following their self-interest as a specific co-ordinational mechanism to a sort of social optimality-balance. It offers a solution for the contradiction between individual selfishness and community welfare, which various utopias drawing primarily on morals tried to solve, each time unsuccessfully. Concerning this appealing idea, doubts arise with full knowledge of the prisoner's dilemma. This type of strategic games, which has been in the centre of the concern of social sciences during the recent decades, delineates the situation, in which the decisions of rational profit-maximising individuals in their sum lead to the worst possible disentanglement on a community level.[9]

[8] Bourdieu, P.: (ed.): *A gyakorlati észjárás. A társadalmi cselekvés elméletéről* ("Practical Thinking. On the Theory of Social Action"). Budapest. 2002.

[9] See, e.g., Axelrod, R.: *The Evolution of Cooperation.* Basic Books, New York, 1984. In Hungarian: Hardin, R.: A kollektív cselekvés mint megegyezéses, N szereplős fogolydilemma (Collective Action as an Agreed Prisoner's Dilemma with N Participants). In: Csontos, L. (ed.): *A racionális döntések elmélete* (The Theory of Rational Decisions). Budapest, 1998. 191–207.

The prisoner's dilemma pertains to the situation, when two criminals, who were once involved in a "make" together, but don't know each other, are arrested. Since without the confession of at least one of them, this crime cannot be proved, only a much lighter crime, the following choice is proffered to the two captives separately. If one confesses but the other does not, one will be released in the scope of plea bargain, whereas the other captive will be sentenced to 10 years' imprisonment. If both captives confess, each will receive 7 years. If neither of them confesses, each will receive 1 year. They are informed that the other party is presented the same conditions. The situation is illustrated by the following diagram:

	X - confesses (competes)	X – does not (cooperate)
Y–confesses (competes)	7(X) – 7(Y)	10(X) – 0(Y)
Y–does not (cooperate)	0(X) – 10(Y)	1(X) – 1(Y)

It is demonstrable that whatever one of the parties chooses to do (whether confesses or not), the other party will be better off with confessing. Thus, this is the rational attitude for both of them separately. At the same time, this is the worst possible solution (adding up the received number of years).

It is a typical prisoner's dilemma situation, when among market actors the question arises, whether they should cheat the other or not, taking into account that this question arises in the other party, as well. It can be easily understood that if we posit pure market relations, individual profits can be generally increased by cheating the other, therefore, the actors of the market will follow this path. (As we saw, robbing the other promises even more profits.) On a social level, however, this is not in the least optimal or efficient. We daresay this is the worst possible condition of a society.

It is by no means certain that the social encounter of profit maximising individuals will lead to optimality on a social level, but it may frequently launch contrary processes. These issues, primarily, the issue which factors lead to market optimality and which give rise to opposing tendencies are dealt with by Douglas North[10] with convincing conceptual clarity. North claims that the prevalence of the negative consequences of the prisoner's dilemma situation is especially possible if (a) the participants do not "meet" generally and recurrently, (b) if the participants do not know the former behaviour of each other (in similar situations), (c) if the number of the participants is especially high. We can easily recognise that this description fits the ideal-typical market transactions. We can consequently infer that the market would be unable to function on its own.

Indeed, the basic condition of the functioning of the market is that the state guaranteed the safety of property including the necessary keeping (e.g., real estate) the registers and the activities related to division and other transactions. Besides, the state is also necessary as the ultimate guarantor of compliance with contracts.[11]

Other "moral" advantages of the market

The market is the field of freedom, self-sufficiency, responsibility, but at the same time of equality, since it is not characterised by hierarchic arrangement, but by the exchange based on the free will of equal parties and by competition

[10] North, D. C.: *Institutions, Institutional Change and Economic Performance.* Cambridge, 1990. mainly: 11–35.

[11] The role of the state as a guarantor of the functioning of the market is more and more acknowledged, although not emphasised by neoclassical economic textbooks. E.g., the university textbook of Stone published recently and used widely, ranging up to 700 pages, devotes a whole page to these two conditions, although with specific overtones (e.g., individual ownership is better than community ownership, etc.). Stone, G. W.: *Core Economics.* New York, 2008. 83–84.

pursued with equal conditions. The enterprise is free. For the entrepreneur, the market is a field on which he can reach autonomous decisions and have them weighed in the balance. For the consumer, the market offers the opportunity of free choice as opposed to the bureaucratic-monopolistic state services (e.g., panel doctors, schools). The background to all this is the impersonal, thus unbiased market mechanism, which measures each party with the same standard.

In fact, however, as the sharp criticism of Perrow[12] demonstrates, in the market economy the overwhelming majority of people doesn't work as an entrepreneur, but as an employee of a frequently huge organisation, in a stiff and sometimes rather relentless hierarchy, while s/he is existentially exposed to this organisation.

It is worth mentioning that big companies determine the everyday lives of people to a rather great extent. We are exposed to monopolies (e.g., water, gas, electricity), banks, etc. The power of these market organisations can be greater than that of the state, and as such, they threaten individual freedom not less, than the state itself. However, while the liberal state and the Rechtsstaat has established the institutional guarantees (institutional structures, fundamental rights, publicity), which provide safeguards vis-a-vis the excessive power of the state, these guarantees are totally absent vis-a-vis the economic power of concentrated capital,[13] which has gradually gained ascendancy over the state, as well. Later I will treat at length that choice on the part of the consumer is sometimes illusory, since the consumer does not have sufficient information to make a good decision and this is expressly impeded by market mechanism.

An argument for the market is its impersonality, which eliminates personal dependence and defencelessness, as opposed to e.g., the decisions of the state. It is worth mentioning here that this is an impersonal mechanism, which today decides this way, tomorrow that way, and there is no appeal against its decisions as opposed to the decisions of the state.

[12] Perrow, Ch.: *Szervezetszociológia* (Organisation Sociology). Budapest, 1994. 6–7.

[13] The "legal realist" movement recognised this in the USA as early as in the 1930s. Therefore, it assigned a greater role to the state as the factor that can rescue the individual from the reign of big companies. Gordon, R. W.: Willis' American Counterparts: The Legal Realists' Defence of Administration. *University of Toronto Law Journal.* 55 (2005) 405–425.

The market and democracy

The market is the world of equal and free people. Therefore, the market is also the basis of the democratic political order, so far as it trains people for self-sufficiency, secures independence financially and intellectually, schools people in being equal with others, etc. The market is positioned opposed to the extremely hierarchic state-bureaucratic establishment, the dreadful examples of which (e.g., in the age of Hayek) were the totalitarian states.

The relation of economy and democracy has been raised by political scientists and political sociology, as well. Lipset[14] examined the issue already since the 50s. Nevertheless, he did not mention the functioning of the market, he considered financial affluence and the absence of too great social differences much more important, while the latter is not the characteristic of the pure market. Whereas, the empirical research based on mathematical statistical procedures by Lane-Ersson[15] examined the issue and the democratic establishment demonstrated significant correlation not only with welfare, but with the functioning of the market. The correlation, however, does not refer to a cause and effect relation. It is easily conceivable that a third factor underlies both factors. (Weber, for instance, would possibly make a guess for the protestant ethic.) In a summary, we can state that empirical data by no means refute the supposition that the market is the basis of democracy, but they do not fortify it convincingly, either.

Market Optimality

Below, I will demonstrate what the optimality and the efficiency of the market mean. This is interesting because their natures are generally unknown for experts dealing with the state and public administration (typically political scientists and lawyers) and for politicians, which gives rise to misunderstandings. Subsequently, I will examine to what extent this notion of efficiency is applicable to the state and to its part, i.e., public administration. Eventually, I will prove at relatively great length that the market does not function according to its efficiency criterion, either. The the market ideal (as opposed to the state) is simply a myth.

[14] Lipset, S. M.: *Political Man. The Social Bases of Politics.* Baltimore,1960. 27–63.

[15] Lane, J.-E.–Ersson, S.: *Democracy. A Comparative Approach.* London, 2003.

Pareto optimality as an efficiency criterion

When economists talk about the efficiency and optimality of the market, they refer to a specific type, the so-called Pareto optimality.[16] *The Pareto optimal is the state, which cannot be changed without incurring that somebody's situation gets worse.* Accordingly, the market is such a state. This is relatively easy to understand, since the market is established on the logic of exchange. It is worth exchanging for those concerned until they are better off with exchange and can increase their so-called utilities. Nevertheless, the exchange will not supervene, if it is not advantageous for any of the parties any longer. On the basis of the same logic, the consumer chooses from the competing products, and on the basis of the same logic, the manufacturer decides which product to manufacture with which input composition.

Although, in case of the market a large number of actors exchange a large number of products, for the sake of perspicuity, the Pareto optimality is generally illustrated as a relationship of two actors. Diagram 1. demonstrates the Pareto optimality as a division between two persons.

The diagram illustrates the potential manners of division between X and Y. The Pareto optimal points can be found on the curve delineated by points A–E–B. This cannot be surpassed (since it would require e.g., more products to be distributed), therefore, Point D denotes an unfeasible solution. Whereas, a move from Point C is possible (upwards or to the right), so that it entailed the increase of efficiency, that is, it led to a better solution both for X and Z.

[16] Below, I am obliged to venture into the area of economics, although I am not an economist. Let it be said in my defence that economists do the same, when they make statements concerning the state. Of course, I learnt economics and strove to get a grip of the related literature at least as an interested dilettante. The statements concerning neoclassical economic arguments draw primarily on Baumol-Blinder [Baumol, W. J.–Blinder, A. S.: *Economics. Principles and Policy.* Dryden Press, Philadelphia, 1994] although, I have naturally surveyed other textbooks, as well [eg., Stone: *op. cit.*] In Hungarian the most often quoted volume is Samuelson-Nordhaus [Samuelson, P. A.–Nordhaus, W. D.: *Közgazdaságtan* (Economics). Budapest, 2005], which is essentially the first comprehensive work introducing the neoclassical economic theory in Hungarian. Since then, several other books have been made accessible, some of them written by Hungarian authors.

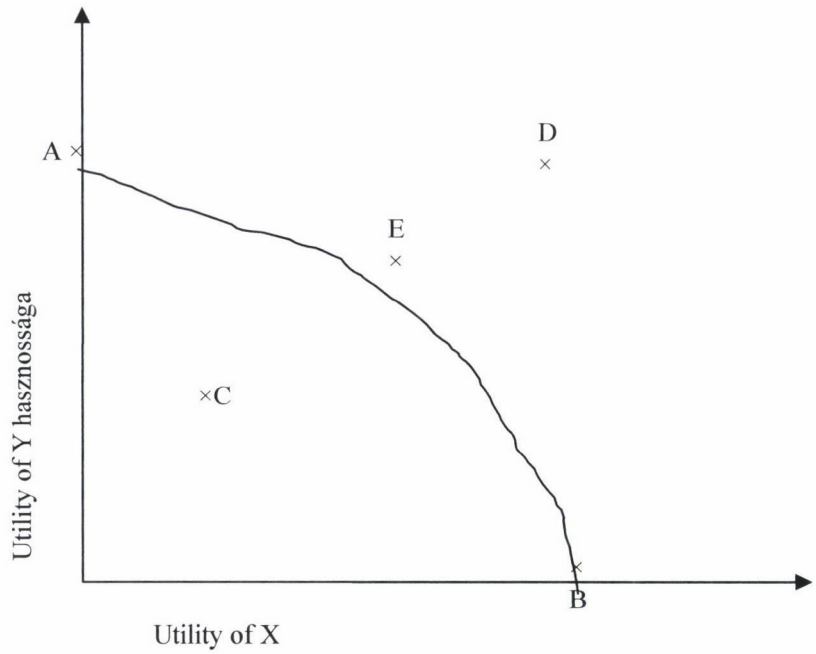

Diagram 1. The graphic illustration of the Pareto optimality

The consequences of the Pareto optimality

Let's have a look at some characteristics of the Pareto optimality!

As Diagram 1 demonstrates, each of the A, E and B points is Pareto optimal, that is, they comply with the concept of market optimality. However, at Point A this optimal state means that everything is owned by Y and X obtains nothing, whereas, at Point B the situation is just the opposite. Practically, at Point A Y prospers, while X simply starves to death. This is obviously a Pareto optimal solution, since Y will not change goods with X, because X has nothing. Our sense of justice obviously prefers Point E, at which the two parties are making similar use of the goods. However, from a Pareto optimal state, just because it is Pareto optimal, it is impossible to move towards another Pareto optimal state, at least not on the basis of the logic of market exchange.

But what does it mean and why is it that Y owns everything, while X owns nothing? Well, this can occur because X cannot sell anything on the market, not even his labour, because, for example, he was born disabled. This example shows a further efficiency feature of the market, so far as it creates an optimal

balance between production and consumption: those who cannot appear on the market as sellers cannot appear as customers, either, thereby, complying with the criterion "who does not work, should not eat, either". It is another issue that the market mechanism is insensitive to such questions as why somebody doesn't work or why somebody doesn't have rich parents.

Let's now see another case! Suppose there is an opportunity to move from this Pareto optimal situation that the utility of a person decreases by a thousandth, while the affluence of all the other members of society (e.g., 10 million) doubles. In other words, social welfare may double at the expense of the hardly discernible decrease of the affluence of someone. However, this move is not possible, since it would mean a budge from the Pareto optimal situation. Indeed, why would the self-interested profit-maximising individual renounce any small extent of utility in favour of others, even if others' lives improved to a great extent owing to that?

These two examples above may demonstrate that with respect to the modern state, the Pareto optimality is not only not optimality, but a pitfall, from which the society must be released. In my view, the crucial task of the state is to release the society from the trap of the Pareto optimality and engender a more optimal state for the whole community.

In this context, it is worth mentioning that we know other optimality criteria and these coincide with our conceptions of the function of the state much more. Economic textbooks so far as they mention it, deal with these under the headword of social utility functions. Generally, three utility functions are specified.[17] According to the utilitarian approach related to Jeremy Bentham, the total utility of the society needs to be maximised. Each member is equal and the extent of social welfare derives from the sum of the affluence of the members of the community. In a peculiar manner, positing equality is insensitive to inequalities. If a member of the society owns 6 million HUF, whereas, the other owns nothing, it is of importance as if both had three million HUF. The optimality connected with Rawls reflects a contrary view. According to Rawls, the welfare of the society can be defined exclusively by the position of the member of the community in the worst situation. The most accepted social utility function is positioned between the two approaches above. This, as sharply simplified, sets out from the fact that "the profit of the rich individual needs to increase at a greater extent than the proportionate to compensate for the decrease of the profit of the poor individual."[18]

[17] See, e.g., Stiglitz, J. E.: *A kormányzati szektor gazdaságtana* (The Economics of the Government Sector). Budapest, 2000. 121–133.

[18] Stiglitz: *ibid.* 127.

It is apparent that optimality can have several other definitions apart from the Pareto optimality. While the Pareto optimality conforms to the market situation and the logic of the exchange, this does not justify, rather questions that we consider it a universal optimality concept, which can and must be always and everywhere applied. Although, we can hardly venture the definition of the function and the role of the state here, the society and the experts would basically agree that the role of the state is guaranteeing the welfare of the community and the support of individuals, who got into disadvantaged and defenceless situations through no fault of their own, what is more, even the decrease of social inequalities. If we consider any of the functions of the state, *the Pareto optimality as a standard with respect to the state is expressly inadequate.* What optimality is in case of the market, it can be a phenomenon to be avoided and corrected in case of the state.

The conditions of market optimality

Market optimality and optimal functioning has several conditions to be interpreted at several levels and from several aspects. Without trying to systematise these, I will select some determining conditions and examine these below.

Market failures

In some cases economists themselves admit that markets don't function perfectly. Generally, however, they think that (a) this scope of imperfections can be precisely defined (these are market failures) and (b) in sum their importance is relatively low and affect only a minor part of the functioning of economy. The most important market failures are as follows:

- The existence of public goods, when the enterprise is not interested in the production of the specific goods, since they cannot be sold as market products (e.g., defence, public roads).
- The existence of monopolies, which produce less more expensively than the market price.
- Externalities, when the market price does not reflect the social value of the specific goods. A typical case of the negative externality is pollution of the environment, when the value of polluted natural resources does not manifest itself either among the costs or in the price. A positive externality is e.g., when the trees of the orchardist provide nourishment for the bees of the apiarist.
- The so-called informational asymmetries, when the parties involved in the transaction are not equally informed primarily about the features of

the given product, e.g., the customer does not know all the essential features of the product.

Further factors also emerge, which may divert the functioning of the market from the optimal. Stiglitz[19] refers to the problems of the lack of balance, of the crises and unemployment, the frequent lack of the perfect competition and the queries of the rationality of actors. Weimer–Vining[20] mentions the issue of temporality: long-term agreements and insurances and generally uncertainty and its handling raise conceptual problems.

In these areas *neoclassical economists admit the imperfection of the market and perhaps, although not unconditionally, they approve of state intervention.* Below, I will formulate doubts and questions beyond these.

The rationality of the actor

According to the departing standpoint of neoclassical economics, the acts of the actors proceeding in market economy is characterised-motivated by the individual endeavour to maximise profits, rational consideration and decision that most perfectly guarantee this. This can be partly valid for enterprises, since the market functioning systematically selects those who are not able to make average or higher profits. However, positing a rational, profit maximising actor can be challenged at several points. Largely in an order of importance, these are as follows:

- preposterous. The informational asymmetries listed among market failures seem to be euphemisms. The essence of the problem is not uneven informedness, since if either the seller or the customer knows nothing about the product, there is no asymmetry, but there is no rational decision or market optimality, either. Namely, reaching a rational decision is possible in case of perfect informedness. Simon,[21] however, in the theory of satisfycing decisions proved half a century ago that rational decision is not possible, and if it is, it is probably not rational, if we consider it from a higher level. (Namely, the collection of information incurs higher cost than the saving deriving from the better decision reached this way.)

[19] Stiglitz: *op. cit.* 88–97.

[20] Weimer, D. L.–Vining, A. R.: *Policy Analysis. Concepts and Practice.* Upper Saddle River, N. J. 1989. 78–93.

[21] Simon, H. A. (ed.): *Korlátozott racionalitás (Válogatott tanulmányok)* (Limited Rationality. A Selection of Studies). Budapest, 1982.

- The decision of a significant part of the actors is not rational. The "end-users" in the economy are simple average individuals, who are on the one hand determining parts of the economic system, on the other hand persons embedded in the fabric of society. It is a century-long debate, whether we are directed by profit-maximising reckoning or factors coded in social culture, briefly, by interests or values. A prominent figure of contemporary social science, Jon Elster,[22] who is the follower of rational positing, demonstrates himself in how many manners the individual departs from the rational ideal. This is also supported by empirical research: the individual decision-maker, especially in so-called risk situations is almost unable to make actually rational decisions.[23] It is doubtful what "utility" means, which the consumer maximises.[24]
- The consumer is unable to make rational decisions. The consumer is most rarely aware of the actual features of the purchased product. A significant part of the goods, e.g., the so-called trust goods are expressly those the content of which cannot be summed up by the "customers". That is the situation in case of the overwhelming majority of services and the products that need expertise. The most typical example is healthcare, but we could mention the services provided by the lawyer, the accountant, the information scientist, the electrician or the plumber. Even the relatively simple products are most rarely homogeneous (probably the products of the commodity stock exchanges are such), and the differences among them remain concealed before use. Besides the difficulties of natural knowledge, the manufacturers devote enormous energy to influencing the choice of the consumer and they do so according to the sense not via the improvement of the otherwise unknowable quality features of the product. Instead, they have recourse to the instruments of shaping brand faithfulness, wrapping techniques, advertisements, etc. All these "market" techniques intend to

[22] In Hungarian: Elster, J.: Savanyú a szőlő (Sour Grapes). In: Csontos (ed.): *A racionális döntések elmélete. op. cit.*; Elster, J.: *A társadalom fogaskerekei* (The Cog-Wheels of Society). Budapest, 1995; Elster, J. (ed.): *Válogatás Jon Elster műveiből* (A Selection of the Works of Jon Elster). Budapest, 2002. 112–153.

[23] Hirshleifer, J.–Riley, J. G.: A bizonytalanságban hozott döntések elemei (The Elements of Decisions Reached in Uncertainty). In: Csontos (ed.): *A racionális döntések elmélete. op. cit.* 25–61.; Tversky, A.–Kahneman, D.: Kilátáselmélet: A kockázatos helyzetekben hozott döntések elmélete (Prospect Theory: The Theory of Decisions Reached in Hazardous Situations). In: Csontos (ed.): *ibid.* 82–112.

[24] Coase, R. H. (ed.): *A vállalat, a piac és a jog* (The Company, the Market and the Law). Budapest, 2004. 13.

divert the consumer (obviously with success) from the rational decision. The inherent element of the market competition is this intention to distort the competition.

All this has a further impact on the functioning of the market.

The market price reflects the social value

The basic condition of the optimal functioning of the market is that the market price should reflect the social value. This is by no means so in the case of externalities. Although, the relation is somewhat more indirect, perhaps it can be understood that informational asymmetries also entail the deformation of the prices, especially in case of the problem described above, namely, when the consumer does not know what s/he buys. The myth that the price somehow mediates the social value, for me is undermined by a concrete example, the advertisement. Although, advertising experts endeavour "to sell" this activity as providing information, it is not difficult to understand that the information value of advertisements is rather low (so far as a happy family, a lovely pussycat and a beautiful young woman has information value in case of e.g., a mobile phone, a car and frozen dumplings), what is more, their role is often expressly misrepresentation. Nevertheless, billions are spent on advertisement. Is advertisement really one of the most socially valuable activities? The value of the advertisement is that by manipulating customers' preferences, companies may increase their profits at the expense of others via the detachment of consumption from market rationality. Let's apprehend that market failures related to advertisements don't explain the difference between market price and social utility. This market segment with increasing share proves in itself the untenableness of the argument that "the price on the whole and in the long run reflects the social value". The price reflects merely the momentary market value and nothing else.

The competition

The prerequisite of the functioning of the market is competition. An extremely great number (an infinite number) of manufacturers and customers can be found on the ideal market. One of the basic theses of Marxist economics is that the market exhausts itself via the inevitable monopolisation. This is valid, if the marginal and average unit cost decrease owing to the increase of production (via the manufacture of not only 100, but 1000 buses). Therefore, neoclassical economists posit that with the increase of production, the marginal cost curve will not decrease to a certain point, but increase after that. Nevertheless,

this astonishing phenomenon undoubtedly requiring explanation is nowhere explained–at least in the textbooks I know.[25] This needs to be accepted as a fact, since the attention is diverted from the fact of the absence of an explanation generally via charts and tables. Recently, economists have still commenced the examination of not perfectly competing, oligopolistic markets.

In fact, perfect competition is improbable for all that, since as we saw the goods are exceptionally homogeneous. The competition is less manifest on the market of Adidas track shoes. Namely, it is in the rarest cases that we encounter perfect competition on the real market, which is the prerequisite of the Pareto optimality.

The price of the exchange

The starting point of neoclassical economics is that while production has expenses, exchange has no ones. Having recourse to the comparison made by Coase,[26] who first raised the problem with great impact, this conception is of the nature as if we tried to describe the physical phenomena on the Earth without positing friction. The functioning of the market cannot be grasped without transaction costs, that is, the costs of exchange. This scope encompasses search and information costs, bargaining and decision-making costs, control and enforcement costs.[27] If there weren't such costs, the existence of companies would be unexplainable, since then the manufacture and assembly of machines, etc. would be solved by exchange. However, exchange has significant expenses and the functioning of the market is shaped significantly via the minimalisation of total costs, among them transaction costs. Transaction costs account for a considerable part of total costs emerging at the level of society. With reference to former empirical research, North[28] estimates that to be 45 p.c. (almost half) of the national revenues of the USA. This is the sum which neoclassical economics doesn't take account of.

The theory of transaction costs is the point of departure of neoinstitutionalist economics. Coase, North and Williamson agree that institutions in broad terms (organisations, systems of norms, etc.) are generally adequate for the decrease of transaction costs, this is what partly accounts for their existence.

[25] E.g., Stone: *op. cit.* 183–184.
[26] Coase: *op. cit.* 9–53.
[27] *Ibid.* 18.
[28] North: *op. cit.* 28.

Crucial institutions of the decrease of transaction costs are the state and law. This conception is reflected by the economic theory of law.[29]

Optimality in the absence of conditions

For a long time, economists were satisfied with the mathematical deduction of the conception that the market is optimal in case of the prevalence of adequate conditions. As far as I know, the conditions were not surveyed systematically and it was especially not examined how the absence of conditions influences the Pareto optimality. In essence, it was supposed that these divert the functioning of the market from optimality only to a small extent and perhaps various effects counter-balance each other (with the exception of the distorting effect of the state). Whereas, Greenwald-Stiglitz[30] proves that the absence of conditions not only certainly diverts the functioning of the market from the Pareto optimality, but it is frequently diverted to a large extent, which is intuitively not expected. They sum up their results as follows:

> The paper thus casts a new light on the First Fundamental Theorem of Welfare Economics asserting the Pareto efficiency of competitive equilibrium. The theorem is an achievement because it identifies what in retrospect has turned out to be the singular set of circumstances under which the economy is Pareto efficient. There is not a complete set of markets; information is imperfect; the commodities sold in any market are not homogeneous in all relevant respects; it is costly to ascertain differences among the items; individuals do not get paid on a piece rate basis; and there is an element of insurance (implicit or explicit) in almost all contractual arrangements, in labor, capital, and product markets. [...]
>
> We have constructed a general model which shows that in all of these circumstances, Pareto improvements can be effected through government policies, such as commodity taxes. Our methodology not only identifies the presence of inefficiencies, but also enables us to identify both the appropriate direction of policy intervention and observable measures of their successful application. [...]
>
> We have elaborated a general model, which shows that in all these cases a state intervention, such as e.g., the luxury tax facilitates a Pareto

[29] In Hungarian: Cooter, R.–Ulen, Th.: *Jog és közgazdaságtan* (Law and Economics). Budapest, 2005.

[30] Greenwald, B. C.–Stiglitz, J. E.: Externalities in Economies with Imperfect Information and Incomplete Markets. *The Quaterly Journal of Economics*, 101 (1986) 229–264.

improvement. Our method does not simply indicate inefficiency, but helps to find the proper direction and method of state intervention.

Stiglitz expounds and elaborates this thought later in several other essays.

Company Optimality

The analysis of economic concepts and myths concerning the market served primarily the elucidation and critique of the theoretical foundation of NPM. This is the ideological background, which generally underlies the conceptions related to the mostly negative value of the state and its function possibly limited to a narrow scope. The company functioning on the market determines primarily the ideal for the NPM, which public administration should follow.

Let's see what constitutes efficiency in case of the company, to what extent this efficiency is true and to what extent it can be applied to public administration!

The concept of company optimality

Adapting the concepts of systems theory, company efficiency *can be described with the formula of OUTPUT/INPUT.* This expresses that the working of the company is all the more optimal and efficient, the larger output can be reached with the less input. Input includes labour force, primary materials, machines and energy, whereas output includes the product itself, goods or services. This can be expressed financially. Input encompasses costs and expenditure, while output encompasses revenues. In this context, it is worth referring to the fact that the definition of profit can be described with the same factors: OUTPUT (revenues)–INPUT (expenditure), that is, *efficiency basically coincides with profitability.*

The efficiency of the company finds meaning on the market. Namely, the price of inputs and outputs is determined by the market. That company is successful which manufactures expensively marketable products with low costs. Positing that prices reflect social utility, that means that an efficient company is a company successful on the market and this company is efficient on a social level, as well.

The efficiency of *market mechanism* manifests itself in this, as well, since *it informs* the company about its efficiency extremely rapidly and precisely via prices. It does not only inform, but it also manages a *selective-rewarding* mechanism. The companies that work inefficiently and utilise relatively too much of social property, to which they contribute insufficiently go bankrupt and get selected out.

The queries of company efficiency

It is probably discernible on the basis of the above that *the crucial issue of company efficiency is whether the market price reflects social values. We saw that in general this is not valid.* It is possible therefore that the company is efficient according to the market prices, whereas, socially it is not. On the basis of the mentioned example: the advertising agency successfully deceiving the consumers is especially efficient on the market. Several further facts emerge concerning the efficiency of companies. Let me highlight the most important ones.

The efficiency of administrative units

In the large and complex corporate system it is basically impossible to determine how the specific organisational units contributed to the given extent of efficiency. In case of administrative units, it is especially difficult, what is more, impossible to determine the extent of their contribution to efficiency or profits. Who can tell the extent of the contribution of the accountancy, the HR department etc. to the efficiency of the company. The significance of the problem consists in the simple fact that public administration and governance are the administrative units of the public, of the society.

The self-interested management

It is a publicly known fact, which coincides with the point of departure of economics that individuals within the company generally take not the corporate, but their individual interests into consideration. E.g., Tullock[31] as one of the founding fathers of Public Choice theory claims that climbing a rung of the hierarchy is facilitated by intelligence as well as by taking not the corporate, but the self-interest (i.e., individual progress) into account. According to Tullock, this is less manifest at companies than in public administration, since the owner supervises the managers more closely. This argument is less valid at e.g., joint ventures. Several scandals of the recent years[32] (e.g., Enron) revealed that corporate management was interested in nothing else, but their own income and bonuses. Crozier[33] introduces the role of power games in

[31] Tullock, G.: *The Politics of Bureaucracy*. Washington D.C.: 1965. 18–21.

[32] e.g., Enron.

[33] Crozier, M.: *A bürokrácia jelensége* (The Phenomenon of Bureaucracy). Budapest, 1980.

organisational dynamics, Perrow[34] or Bakacsi[35] elucidate that the role of these is determining at companies, as well. Essentially, the principal-agent theory also dwells on this problem. Therefore, corporate participants are by no means motivated by corporate efficiency, thus, corporate dynamics is not necessarily characterised by this trend, either. Again, the question is whether the market is adequate for coercing companies into efficiency at an acceptable level.

Contingent luck in corporate success

According to the populational-economic trend of organisation theory, from among the contingent mutations of companies the one that survives in the long run is that which is more capable of adaptation to the changes of the environment unpredictable for the company.[36] All the management wisdoms are in fact hoaxes. Although, the statement is audacious, several facts seem to support it, among others e.g., the fact that sharply contradicting management theories prevail at the same time and the choice among these is determined rather by fashion than tested increase in efficiency.[37]

The applicability of the corporate model in public administration divergence or similarity of public and private management

Are the public and private, i.e., corporate management basically similar or divergent? The answers to the question are rather contradictory. Lőrincz, Lajos[38] points out that standpoints traversed historically in one or the other direction.

The classical essay most frequently referred to in the science of public administration,[39] which also draws on former works, recognises substantial divergences. Allison outlines public administration as one in which the *measurement and interpretation of efficiency is difficult, while it needs to meet other abstract and concrete requirements*. Abstract requirements include lawful and democratic working and safeguarding equal treatment, equity,

[34] Perrow: *op. cit.* 281–288.

[35] Bakacsi Gy.: *Szervezeti magatartás és vezetés.* Budapest, 1998.

[36] Kieser, A. (ed.): *Szervezetelméletek* (Organisation Theories). Budapest, 1995. 318–35.

[37] Powell, W.–DiMaggio, P.: *The New Institutionalism in Organizational Analysis.* Chicago, IL, 1991. 26–27.

[38] Lőrincz L.: Közigazgatási reformok: mítoszok és realitás (The Reforms of Public Administration: Myths and Reality). *Közigazgatási Szemle,* 2007. 3–13.

[39] Allison, G. T.: Public and Private Managers: Are They Fundamentally Alike in All Unimportant Respects? In: Lane, F. S. (ed.): *Current Issues in Public Administration.* New York, NY, 1982. 134–151.

openness, etc. These can easily collide with the requirement of efficiency, which thereby is only one of the requirements. It is a peculiar paradox that in case of public administration these requirements frequently colliding with short-term efficiency can in the long-run become the pledges of social efficiency. Democratism, the safeguards of constitutionality protect from the brutal rationality of bureaucracy, which, when distorted into a dictatorship, threatens the whole society.[40]

Public administration needs to meet concrete requirements, as well, such as the expectations of interested social groups and their interest representatives, the branches of judicial and legislative powers. The management of the public sphere as manifestly opposed to the business sector takes place by the permanent control of the media. Openness also pertains to a broad scope of citizens.

There have always been approaches, which *emphasise the similarities of public and private management*. These don't regard the divergences as important or construe them as anomalies. Essentially, this approach characterises NPM, as well. Below, I will bring up arguments for the issue why the management of public administration as a quasi company is inadmissible.

Efficiency and effectiveness

Via an oversimplification, efficiency refers to the already mentioned OUTPUT/INPUT formula, whereas effectiveness refers to the extent of the achievement of a goal. These two factors are the same in case of a company: both coincide with the possibly highest profit. What is more, according to market ideology, both guarantee an optimal level of social welfare, that is, efficiency on a social level. No doubt, in the absence positive social impact, companies could be still efficient and effective on the actual market. (See, e.g., successful advertisement agencies).

A basic concept of the theory of public policy and public administration is *the separation of efficiency and effectiveness,*[41] and *in another dimension, the distinction of efficiency measured and construed on the level of the organisation and of the whole of public administration.*[42]

[40] This was referred to by Weber, when he considered more democratically functioning states altogether more efficient than the extraordinarily efficient Prussian public administration. See, Albrow, M.: *Bureaucracy.* London, 1970. 64.

[41] Hajnal, Gy.–Gajduschek, Gy.: *Hivatali határok – társadalmi hatások. Bevezetés a hatékony közigazgatás módszertanába* (Office Boundaries–Social Effects. Introduction into the Methodology of Efficient Public Administration). Budapest, 2002. 11–14.

[42] Lane, J.-E. (ed.): *Bureaucracy and Public Choice.* London, 1987. 23–24.

We have seen that in case of the activity of administration, efficiency can be rarely defined. The application of the OUTPUT/INPUT formula is especially difficult in the public sphere, since outputs (public services) generally have no actual price, and even expenses can be frequently hardly defined. What is even more essential: in the public sphere, the actual value of the output is determined by its social effect. Public administration is effective, if it fully complies with its objective, the increase of social welfare, since this is the objective of public administration. Therefore, *effectiveness queries social effect, whereas efficiency refers to the amount invested to reach this effect.* Of course, the amount invested encompasses not only the input of public administration, but social expenses as well, of which the company takes no account, unless the state charges them to the company.

It follows from the above that a specific public administrative organisation can be efficient (and even effective in a narrow sense), while it is not efficient from the viewpoint of the society, therefore, of the whole public administration. Thereby, the Labour Office can send unemployed people in great numbers to retraining courses (which is one of its major tasks), which work very cost-efficiently (a lot of people are trained at high level, in a large number of hours at low cost). Therefore, the organisation can be considered effective and efficient. At the same time, if the content of the training is not adequate (e.g., dressmakers are retrained to be miners), the activity will be unsuccessful from a general social point of view, and thus, its efficiency will be essentially low.

In a summary: *in case of the public sphere, the company efficiency index is practically incalculable. Since in the public sphere the standard of value of the activity is not the financial profit, but the positive social effect, therefore it is not really relevant*, since the prices do by no means reflect the social value.

Client-orientedness and authority matters

Companies endeavour to meet most of all the consumers' demands, so that their products are chosen. One of the objectives of NPM is the reinforcement of client-orientedness, in the area of which results have been achieved the most unambiguously. I claim however, that the satisfaction of clients is not necessarily an asset.[43]

[43] I elaborated elsewhere, how peculiar client satisfaction is, which may as well work out in opposition to the actual achievement. Gajduschek, Gy.: *Módszertani útmutató a hivatali ügyfélelégedettség méréséhez* (A Methodological Guide to the Measurement of Client Satisfaction in Offices). Államreform Bizottság honlapja (Homepage of the State Reform Committee), 2005. Here, however, I do not dwell on this.

Is it auspicious if the police is evaluated on the basis of the satisfaction of criminals, or if the criminals can choose which investigating authority should proceed in their case? Is it a favourable sign that the banks are basically satisfied with government control? A part of the tasks of the state is public service, the beneficiary of which is the individual citizen (education, healthcare, social services, public transport, etc.). In these areas, which developed good half a century ago with the appearance of the welfare state, the opinion and satisfaction of those concerned can be an important and relevant index.

The other part of state tasks prevailing for thousands of years is the so-called authoriative activity, typically various types of law enforcement. Proceeding as such, the state intervenes against the client and incurs inconvenience (prohibits, obliges, fines, raises taxes, etc.). Although, it does so in favour of the community, all the other citizens, but they do not directly appear as clients in this procedure. Briefly, the market mechanism attached to "the direct consumer", which can be very useful on the market, may lead to a deformed feedback opposed to real assessment in this fairly significant area of state activities.

The market mechanism does not work

The market cannot attend to and has never attended to the majority of state tasks. The market is unable to provide public goods. At other times, the market optimum obviously departs from the social optimum and from that which the large majority of the society considers the social optimum (e.g., everyone should get elementary education).

We need to remark that most NPM techniques do not dispute this fact. Instead, they would sustain the state as a financier, although, the task would be expressly performed by the organisations of the business sector or market mechanisms would be applied. The explanation of NPM is the increase of efficiency. An alternative, not less plausible explanation is that *NPM is an ideology, which favours enterprises, especially larger business enterprises*[44] via opening up new market segments and the generation of large procurments for capitalist groups.

[44] Farazmand, A.: Privatization and Globalization: A Critical Analysis with Implications for Public Management, Education and Training, *International Review of Administrative Sciences* (IRAS), 68 (2002) 355–371.; in Hungarian: Hajnal, Gy.: *Igazgatási kultúra és New Public Management reformok egy összehasonlító esettanulmány tükrében* (Management Culture and New Public Management Reforms as Reflected in a Comparative Case Study). Ph.D. Dissertation. Manuscript. Budapest, 2004. 34–37.

Risks

Acknowledging that competition is the guarantee for efficiency, this conceptually entails that certain companies go bankrupt. Is it acceptable that organisations serving the whole society or large communities simply disappear, so that their tasks are not performed by any party in the short or long run? E.g., water, electricity, gas supply and the drainage system, prisons, the maintenance of public order and education.

Empirical data

Of course, it is the most convincing, if we examine empirically whether the public or private organisations work more efficiently. This, however, beyond the methodological problems encumbering comparative research, is impeded by several obstacles. There are relatively few areas, in which we find both public and private organisations, and if we do, they frequently appear not to perform the same activity (e.g., expensive private schools). For limitations of scope, even the rough survey of methodological problems is impossible. Instead, I will attempt below to introduce the results of empirical research published in this subject-matter in the broadest possible scope. (A more detailed summary: Gajduschek.[45])

Weimer–Vining[46] surveyed the publications published before 1989. The authors found that from among the reports of research carried out in the scope encompassing electricity supply, air travel and fire service, 65 claimed that the performance of tasks by private organisations was more efficient and more successful and only 7 found that the performance of tasks by a community was more efficient, whereas in 19 cases no unequivocal conclusion could be reached. Since I did not find a similar comprehensive and summarising study, I tried to survey the studies published in the meantime myself. Unfortunately, I could identify only 16 empirical comparative studies, but I didn't find a single one, according to which the performance of tasks by a community organisation was more efficient. Nevertheless, in the majority of cases methodological aspects can be raised, which query the final conclusions.

[45] Gajduschek, Gy.: Közigazgatási eredményesség – Piaci hatékonyság? avagy Alkalmazható-e a piaci ideál a közigazgatásban (Success in Public Administration–Efficiency on the Market? or, Is the Market Ideal Applicable in Public Administration?). In: Lőrincz L. (ed.): *Eredményesség és eredménytelenség a közigazgatásban* (Success and Failure in Public Administration). Budapest, 2009. 67–72).

[46] Weimer–Vining: *op. cit.* 195–200.

The other approach is the examination of the effect of NPM. This consists in the transfer of the solutions of private managemet and the market mechanism to the practice of governance and public administration. Therefore, the question can be raised whether efficiency increased as an effect. The data in this case are not clear and convincing, either. In the 5th chapter of their book analysing the results, Pollitt–Bouckaert[47] emphasise that the increase of efficiency can be construed on several levels (they distinguish four levels), but unambiguous index-numbers cannot be defined on any of the levels and convincing data do not obtain. At the same time, NPM seems to have been able to restrain the rate of state expenditure increasing for centuries and gradually accelerating in the previous decades. The authors also establish that competition situations generally improve efficiency disregarding whether we are talking of a public or private organisation. It is an interesting but not a surprising statement that while NPM considers the satisfaction of costumers one of the most decisive aspects and as an effect "client-orientedness" gains ground, according to data, the trust in public institutions and public services significantly decreased specifically in the countries of NPM.

As several experts and more and more simple newspaper articles highlight, the price of the contingent increase in efficiency achieved by NPM must be paid elsewhere. That price consists in the absence of long-term investments, the decrease of safety, the exclusion of problematic clients (vis-a-vis of equal access). Of course, NPM affects the whole state, as Rhodes in his article establishing a concept (Hollowing out of the state) wrote the state erodes mostly as an effect of NPM. This emerges in *the absence of co-ordination*, the sectors function in a fragmented manner and the left hand frequently does not know what the right one is doing. *The perspicuous relations of responsibility dissolve*, since instead of the former lucid (bureaucratic) structures, several actors in various positions appear, among whom the relations are mostly puzzling (contractual, subjected, political, client, etc.). As an effect, *the public policy making capacity of the centre weakens and the political control over public administration*, which is the pledge of democratic functioning, *also weakens considerably*.

A rough assessment of the Hungarian situation

In Hungary, NPM evolved at the same time as the change of regime, which implied the radical transformation of the functioning of the state and the economy. Both the change of regime and NPM channelled the changes in the

[47] Pollitt–Bouckaert: *op. cit.*

same direction: the decline of the role of the state and the reinforcement of market processes. Therefore, it would be both theoretically and empirically *difficult to detach the role of NPM within the process of the change of regime.* This role may be most identified in the conscious diminution of the state, and within this, of public administration and in the maximisation of the opportunities of the business sector.

The change of regime undoubtedly entailed notable and *shocking changes* in several elements. Beyond the decrease of the power of the state, the changes led to *the uncertainty of the scope of state.* On the other hand, *a part of the instruments* formerly applied for the performance of state tasks *became legally prohibited, another part of them became socially and management-technically inadequate.* As for me, I think that the final result of the process is the emergence of *the impotent state*, which is incapable of the performance of its most elementary tasks: incapable of the maintenance of order and the enforcement of the law.[48]

In line with the change of regime, the establishment of the framework of the Rechtsstaat also took place. It may be due to the natural oscillation of the pendulum that a kind of hyper-Rechtsstaat was formed with safeguards for individual rights (at least on the face of it), which frequently surpass the similar institutions of the most developed democracies. From the viewpoint of our subject-matter, this entailed that the state and especially public administration became almost perfectly jeoparadized without its instruments used before. It became incapable of control of the illegitimate methods manifesting themselves in the business sector.

The solutions of NPM were originally introduced in relatively well-functioning states. Whereas, in post-socialist states *NPM* in line with the hyper-Rechtsstaat *was thrust on a confused public administration unestablished as to its function, structure, functioning and administrative culture.* Thereby, NPM did not serve the improvement or reconstruction of former solutions (of the welfare state), but *increased the chaos* exclusively in favour of those wishing to fish in troubled waters. The practical foundations, on which NPM could really contribute to the increase of efficiency, were also missing. *The well-functioning market is missing*, as there are several actors (sellers) that can perform specific tasks (eg. Road construction). The few existing sellers are not reliable. The well-functioning *legal system* is also missing, in which crystallized contractual-institutional techniques exist for the employment of private organi-

[48] Gajduschek, Gy.: *Rendnek lenni kellene* (There Should Be Order). Budapest, 2008.

sations for the performance of public tasks.[49] Underlying all these, the necessary political, administrative and business *culture and ethics* are missing.

As early as in the mid-'90s, Verheijen[50] as a single among foreign experts warned of the dangers. Summarising the results of a research which analysed the public administrative systems of the Central-Eastern-European region and the effect of NPM, he pointed out that

- in these countries, where coordination was always a problem, NPM further exacerbates it, and beside the absence of the horizontal coordination among ministries, generates the absence of vertical coordination;
- perplexes totally the otherwise problematic relations of responsibility, since NPM intends to supersede bureaucratic responsibility for the utilisation of resources by responsibility for achievement, however, in a Central-Eastern-European context this rather entails the total collapse of the system of responsibility;
- the continuity so important in public administration is terminated;
- NPM reforms lead to the politicisation of public administration in the region.

The statements of Verheijen seem to be confirmed by the facts.

In the absence of significant empirical research, we can merely draw on impressions or hypotheses, if we question the main promise of NPM, i.e., the increase of efficiency. We know numerous scandalous stories from the press encompassing motorway constructions and the procedure of the sale of the buildings of public organisations to enterprises, which are then rented by the same public organisations, thereby, they reimburse the whole purchase price as rent in 2 or 3 years, etc. *Therefore, we can hardly attribute an efficiency increasing effect to NPM in the region.* Carrying things to extremes, it functioned as an instrument of the illegitimate privatisation (i.e. stealing) of public property.

Summary and Conclusion

In this essay, I criticised the ideology of "market-corporate is good, state public administrative is bad", which manifests itself most directly in New Public Management, which is supported by mainstream economics and Public Choice theory.

[49] Horváth M. T.: A magánszektor és a decentralizáció szerepe a közszolgáltatások szervezésében (The Role of the Private Sphere and Decentralisation in the Organisation of Public Services). *Jogtudományi Közlöny*, 54 (1999) 18–35.

[50] Verheijen T.: Commentary on ... 'Western' public management. PA Times, 20 (1997) 3, 12.

In my hope my arguments have raised doubts concerning the conviction that market competition and exchange are some primeval and optimal social organisation, which reinforces the greatest virtues of the individual and at the same time grounds the democratic establishment.

I suppose I have succeeded in undermining the statement that the market is really efficient. I think it is even more essential to introduce the conception that the specific efficiency of the market, the Pareto optimality cannot be applied to state activities, what is more, one of the basic tasks of the state is a displacement from the Pareto optimality (if that prevails).

The queries concerning the applicability of the corporate ideal may have also raised doubts. This can be reinforced by the fact that even if international experiences are conflicting, Hungarian experiences, although they are not processed scientifically, seem to be unequivocal. Here, NPM has not even been increased economic efficiency. On the contrary: NPM has led to waste and an increased level of corruption.

All these are mere arguments. Concerning NPM, critical voices have been more and more emphatic in international special literature for almost a decade, which has not had considerable effect yet. The ideology idealising business life and the market was swept away by the great depression in one or two months. I am afraid from this time on, we will hear exclusively the voices of criticism (the loudest will be the former preachers of NPM). In the meantime it is to be feared that employable solutions will also vanish into thin air (as usual), although there were some.

As for me, I see two large, basically different areas of state activities. One of them is authoritative activity, in which the state proceeds with the instruments of power against the citizen, for whom it generally incurs "inconvenience" in the interest of the community. The other is the area of public services, which became determining primarily with the emergence of welfare states, and as such, it is a new state phenomenon, although, the overwhelming majority of the resources of the budget is spent on such purposes. In these areas in the majority of cases it can be relatively precisely defined who the "consumer" is, the party to whom the state provides something, and what the content of the service is. Of course, this separation is extemporaneous,[51] since several public

[51] The legal conception of Hungarian public administration recognises only the first element and construes the second one primarily in this theoretical framework. The Anglo-Saxon conception, however, regards everything as public service, therefore, construes everything on the basis of the logic of "services". As for me, I think the unelaborated nature of the two theoretical approaches is a great deficiency of the science of public administration. The differences and similarities and their consequences are unclear.

administrative activities can't be classified to either area, whereas several activities can be classified to both areas. Nevertheless, this separation can ground the decision on the application of NPM techniques. Namely, the activity of the authority follows a basically different logic from that of the market (it is not accidental that this one has been a state activity for several thousand years). Whereas, in the area of public services the application of market mechanisms can have several advantages.

Let me remark that the market is an extraordinarily auspicious feedback mechanism for the company. It informs the company rapidly, reliably and unambiguously about the market assessment of its achievement via prices. What is more, it does not only inform but at the same time also sanctions and eventually selects out the company with low achievement according to the value judgement of the market. It would be difficult to deny the advantages of this mechanism vis-à-vis the political feedback mechanism, which supervenes basically at the elections every four years, which is only indirectly related to the real achievement of the state and of politicians governing the state and to be elected. In case of the state designed to serve the community, the market feedback mechanism has a remarkably significant deficiency, namely, that market prices do not reflect the scale of values of the society, which contradicts the declarations of economists. So far as the state can correct this by representing the social values or at least approaching these, the orientation via prices and strengthening the competition can be expressly advantageous in several areas of public services.

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Social Europe and Its Hungarian Lessons**

Abstract. Europe is not only the land of origin, but also the principal keeper of social rights, since it is associated with the concept of Europeanism. The obvious social restrictions in Hungary as well as in other countries of Europe in recent years make it absolutely reasonable to examine to what social-economic context the discernible withdrawal of welfare services provided by the state is attributable. The similar manifestations are supported by no means by the same system of social conditions. As to its basis and dating back to its historical origin, the current social policy of the EU is framed in the spirit of the conceptual system of the social state. The Fundamental Rights Charter (just as the "European Constitution Treaty", as part of which it may become mandatory) does not reflect either the labour society or Europe of the peoples, but the conceptions of the capital, of political classes and eurocracy. Nevertheless: considering the power relations of global capitalism, we need to appreciate as an apparent actuality that in the midst of these relations the charter insists not only on the requirement of European unity, but also on a modernised version of the social conceptual system. The purpose of this treatise has been to highlight that social objectives cannot be treated as isolated from their economic and social context. We should not risk balance by the maintenance and preservation of a social-organisational framework via overspending, which altogether contradicts the possibility of development and the sustainability of equilibrated development.

Keywords: social rights; welfare state; welfare benefit, social state; social policy; social concept; neo-liberal economic policy; administration; Fundamental Rights Charter of the European Union; Lisbon Treaty; active integration; civil society; civil organisations

Introduction

The obvious social restrictions in Hungary as well as in other countries of Europe in recent years make it absolutely reasonable to examine to what social-economic context the discernible withdrawal of welfare services provided by the state is attributable. The similar manifestations are supported by no means

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by the same system of social conditions. The cancellation of welfare benefits raises tensions everywhere, however, in post-socialist states this coincides with the fact that in societies which provide welfare benefits at a higher level than they could afford according to the level of economic development, the transition is by far more difficult, since the population had not been in fact prepared to design its life on different bases. In Western Europe, the transition has been somewhat more planned and the role taking of the state and the effect of the European integration have been capable of gradually adjusting social motions to different paths. These societies demonstrate that the peripheral conditions of the responsibility of individuals taken for themselves have evolved, scilicet, these states offer alternatives, real opportunities and individual fates follow coerced paths to a less extent. I think the complex conception which does not regard social expenditure as unproductive cost, but regards it as a heaver of economic growth, which associates welfare benefits with achievements, does really provide greater opportunity for sustenance at an individual and social level equally.

An inquiry into the public administrative context of the issue is equally important. Since on the one hand, it was the establishment of the social duties of the state that entailed a significant extension of the state and administrative duties by taking a new kind of role in the 19th century at the expense that the state abandoned its former non-interference policy with economy, which at the same time swelled its duties to an unpredictable extent. Although, it endeavours to shirk that scope of duties more and more, it is not all as smooth sailing as we imagine, since in the meantime the social consciousness of humankind due to the incorporation of social rights into international documents and domestic law has grown to such an extent that the curtailment of these rights cannot be implemented without a hitch, scilicet, the free spirit cannot be smoothly corked back into the bottle. Nevertheless, public administration is trying to apply new solutions, on the one hand, by transferring its duties to the actors of the civil sector, on the other hand, by making in the same manner the implementation of its social duties more efficient, inexpensive and more reliable.

The social concept has covered a long distance since its evolution. Social rights have had ascendant and descendant eras,[1] although, they have been in the crossfire of ideological, philosophical and economic-political debates at all times, nevertheless, they have not been relegated or neglected so far, since at times this was attempted, it turned out to arouse fits of social passion, which has often forced the most resolute reformers to recoil.

[1] See: *A szociális piacgazdaság szociálpolitikájától a neoliberális állam antiszociál-politikájáig* (From the Social Policy of Social Market Economy to the Anti-Social Policy of the Neo-Liberal State). http://www.brainworker.ch/Sozialstaat/sozialpolitik.htm

We can state that *Europe is not only the land of origin, but also the principal keeper of social rights, since it is associated with the concept of Europeanism.* (They have turned up outside Europe as a result of waves of constitutionalism.) This, however, does not imply that the enforcement of social rights and social achievements in European states would mean the same. The fact that social rights have manifest bad patches dependant on the economy and politics, has not implied the explicit acknowledgement of the change of the basic ideology set forth under statutes. At the same time, we need to understand that social states have not constructed their systems on the same basis, and in this context some of them on an essentially more solid basis in terms of welfare could reach more considerable achievements, i.e, social security which insures living for all, thereby, they have become exemplary (the Scandinavian wonder). Such diverse starting points seem to be more adequate for the maintenance of social achievements, possibly since social solidarity became more established in public thinking, which renders basic issues, such as everyone has the right to a living at all ages, substantially unquestionable.

When we follow up the changes of the social concept below, we need to inevitably consider the various economic policies, which underlie or support state politics. Economic policies followed by the states objectively substantiate the relation to social rights in economic terms, however, economic efficiency and the relation of the state to social rights are not in direct proportionality.[2] For the sake of completeness we need to add that its contrary is not positively true: *we cannot claim that securing social rights is infallibly anti-achievement, whereas achievement-orientedness would by all means entail social insensitivity.* Scilicet, the solution is to be found in their balance. This may require a new way of thinking and essentially, calculations to find out whether a less expensive, but more expedient manner of service obtains instead of the prodigal solutions considered unchangeable. It is also certain that goals need to be reframed, however, we cannot acquiesce without full revision either in adherence to the maintenance of expensive solutions believed (or claimed) to be unchangeable, or in the abandonment of social care.[3]

[2] Butterwegge, Ch.: *Krise und Zukunft des Sozialstaates.* The Crisis and the Future of Social States (Second revised edition). Wiesbaden, 2005, 318.

[3] The manner, process and examples of the readjustment of welfare services are analysed in the world-famous work also published in Hungary by Osborne, D.–Gaebler, T.: *Új utak a közigazgatásban* (Reinventing Government). Budapest, 1994, 330. The fifth chapter deals with achievement-oriented government, which makes it obvious that new objectives and measurable achievements can turn the provision of services more inexpensive and better (consumer friendly).

What seems to be certain in any case is that the social concept is present in the ideology of the European Union and the effect of the EU prevails and influences the trends of development. This defines a path in post-socialist states, as well, from which any departure is not advisable in the spirit of Europeanism and in the interest of remaining within the EU. Although, in post-socialist states the constrained cancellation of social rights implies something different from that in the EU15, which, however, does not mean at all that it would arouse less tension in these societies, what is more: the change of the basic ideology entails, if possible, greater crises in the lives of individuals as well as in politics.

The social state requires the harmonisation of state action at several levels:

a) *The legal framework*, within which all the actors of society can proceed, *needs to be elaborated at the level of regulation.* (E.g., The relations of employers and employees can be settled by the instruments of labour law. These encompass the prohibition of child labour, the issue of labour agreements, the instruments of protection against dismissal, the regulation of working hours. This is merely one area of the pertinent regulation, which needs to be elaborated and implemented in compliance with others.)

b) *Social counterbalance* is secured by tax policy and the provision of services.

c) The third level consists of *financial securities*, which provide solutions for elementary life-situations (disability to work, illnesses, retirement, caring and unemployment insurance, basic insurance and welfare benefits for employment seekers, welfare housing constructions, etc.).

d) Finally, this scope includes *institutions that promote social integration and socialisation* from education to child and youth policy as well as *personal services*, e.g., in the form of counselling, training and help in threatened life situations.

The state in different societies does not undertake the same role as to the standard of welfare services. The difference consists in the way it interferes with market relations, to what extent it distorts them or facilitates turning the social processes market-oriented, and with respect to these relations, to what extent it endeavours to proceed in a restrictive and redistributive manner. On this basis, *I distinguish liberal, conservative and social-democratic basic types.*

The state with a social role can have various definitions. *In a functional sense*, the social state is the complex of state institutions and tax regulations, which can provide solution for crisis situations in a democratic way, remaining in the framework of the social order. These are risks which the market itself cannot handle.

According to the so-called normative definition, the social state implies the extension of state action towards the social. Consequently, the state is capable to decrease social inequalities with legal means. These require the transfor-

mation of former state action in the spirit of a new social justice, which is possible of course only to a limited extent, since the incorporation of the social concept into the capitalist economic order contradicts the basic concept of capitalism from the outset.[4]

Today, social role-taking by the state essentially overlaps a definite scope of welfare services. Its most important pillars are:

- a comprehensive retirement pension scheme,
- education organised (or supervised) by the state,
- access to healthcare services guaranteed by the state,
- other services accomplished via redistribution and covered by taxes, among these principally the various methods of handling unemployment.

The evolving peripheral conditions of the entire new system attach services to achievements, that is, they integrate more and more conditions into the system, which basically modify the role of the state, decrease and restructure its expenditure, thereby, they base the security of citizens on the market, and on that basis, the state announces social equal opportunity as a basic principle.

Neo-liberal economic policy and social role-taking by the state

The crisis on the labour market evolving subsequently to the oil crisis in 1974–75 led to a departure from the demand principle of the Keynes-system and directed the economic policy incurring the change of the state social policy towards an export-oriented supply theory. Afterwards, further establishment of the social state was terminated, although, there was no proof that the management of the social state led to the economic crisis, rather that it could not in fact prevent the crisis and proved an inadequate instrument for the avoidance of crises.[5]

[4] Heimann, E.: *Soziale Theorie des Kapitalismus. Theorie der Sozialpolitik* (The Social Theory of Capitalism. A Theory of Social Policy). Frankfurt am Main, 1928, 3 (reprinted 1980) 167.

[5] This sums up the main argument of the followers of the neo-liberal era of Keynes, nevertheless, they do not see another exit, but the decrease of wages. As Péter Farkas accordingly formulates in his article „Mi jön a monetarizmus után? (A liberalizmus előretörése a hetvenes évektől") ["What follows monetarism? (The sudden advance of liberalism since the '70s")], *Magyar Tudomány*, 45 (2000) 1087. "The experts classified to the trend known as post-keynesianism opened the way towards free market principles. The main representatives are J. Tobin and F. Modigliani. On the one hand, they emphasise more powerfully that "adequate functioning of the market underlies the rational working of the economy", but they also add: "market prices and wages are too stiff to create a socially acceptable balance without adequate state economic policy...". On the other hand, they

Neoconservative theories and the state policies based on them can be distinguished by the feature that they declare conceptual equality and they are confused enough to motivate the majority, while in fact they commercialize all life-conditions. Becoming a product marks the human condition from birth to death, including studying, free-time activities, love, culture, and so on.

Neo-liberal economic policy increases social differences more and more even in the face of increasing wages. Namely, not only the standard of living rises, but in the face of moderately increasing wages, a price-restucturalisation takes place, which classifies wider and wider strata of the society as hard-up groups and turns even the life of the less poor more and more unendurable in the face of the pressure of consumer society.

It seems that it is not the lack of the budget that is the only reason for the repression of the social achievements of social states, but the world-wide (global) economic competition, from the pressure of which Europe, which professes social principles, cannot withdraw itself, whereas its working seems to become contradictory, while struggling in the net of this duality. The principle of efficiency would require that the socially aided should "get straight" the sooner the better, however, they are often banned from working, while living on unemployment benefit.

The policy supported by a neo-liberal basis represses allowances without performance, whereas, it maintains state social policy in a renewed, modernised form and also extends it with elements that contradict the very neo-liberal economic policy, which eventually manipulates them from the background.

If the states coherently enforced the neo-liberal logic, that would entail that since the expenditure of the social state cannot be afforded, retirement pensions need to be cancelled or curtailed, and there would be no obstacle to the elimination of nursery schools, to raising the retirement age limit, to the elimination of the taxation of the real rich according to their assets, to becoming tax-free of capital returns, to the elimination of the taxation of real estates.

Even if state measures are not so radical, nevertheless, the following tendencies are unfolding in the background:

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claim that if disproportionateness is too high, the role of the state should be more powerful, otherwise fine-tuning is sufficient. Contradicting the former leftist interpretators of Keynes, they consider the moderation of wages necessary (in the interest of curbing the inflation and the increase of productivity and production, etc.) Therefore, from an entirely different theoretical basis, they reach the same point as the liberals: the key to the solution of difficulties is the moderation of wages. The experts classified to the trend known as post-keynesianism are open towards free market principles." http://epa.oszk.hu/00700/00775/00022/1087-1096.html

- Endeavours directed at the improvement of the structure of the state budget emerge,
- Expenditure on labour and education is powerfully limited,
- The period of paying unemployment benefits is radically curbed,
- Repressive measures are taken with respect to those living on welfare benefits, the unemployed and refugees,
- Due to the active labour policy of the state, the partial privatisation of the labour market ensues.

Western European societies seem to unanimously follow neo-liberal thought or the implementation of the according sets of measures is just in full swing. At the same time, the reduction of social expenditure is not a sufficient instrument. On the other hand, the increase of revenues should be arranged, which is circumstantial, since the owners of finances can always resort to instruments such as the stoppage of taxes, black market, or "creative" accounting... In fact, a redistribution of revenues takes place, which via the legal decrease of the burdens of enterprises and other forms of amenableness of the state towards them results in an ever increasing difference in income.

Eventually, Agenda 2010 of Europe is also based on the neo-liberal economic policy, even if in form it maintains the legal framework of the social state. From the once social role-taking of the state hardly has been retained more than the formulation of principles, on the basis of which instead of real state services, rights and freedoms are set forth, which at least in principle facilitate, but do not on any account guarantee a living. An ever more significant role devolves on individual efforts and the state promises assistance to these, which in certain cases does not overextend counselling and a control over the sustenance of rights.

Social policy really seems to be a Sisyphean task, since its ultimate goal, i.e., granting equality for all the members of society, has never been achievable. If, however, a certain task is not accomplishable in a certain manner, it is possible that the goals or the manners of implementation or both need to be modified. Nevertheless, we cannot sedate the society with the maintenance of the illusion of both, and not only for ethical reasons, but also because sooner or later the soma will not help the trouble, because a situation can occur, when the inevitable consequence of drug-omission may be the publication of concealed or stretched reality-segments. Therefore, social rights need to be deployed not as a dysfunctional instrument of sedating the people, or as a substitute instrument of arousing remorse, but they need to be regarded as an opportunity, which cannot only be referred to, but which like the gravest social problem can also be treated: wisely and prudently without an ulterior purpose, viewing it as an indispensable instrument of the sustenance of society.

In this sense, the apparently rightful question remains, if the state, when it facilitates, what is more, supports the becoming market-oriented of social processes, acquiesces in the fact that those without services or vegetating on the periphery of being are doomed to eternal exclusion or intervenes in the interest of balancing the processes by redistribution, which grants opportunity for those in a socially disadvantaged or cumulatively disadvantaged situation. If the state cannot provide that or reduces the responsibility of people for themselves by insuring services, which makes the society forced into overreaching solidarity hostile towards the "parasites", then the state does not perform its real mission, i.e., the maintenance of the balance via securing the sustenance, survival and further development of society. An extravagant diversion by the state in either direction or a resigned detachment is a state policy, which cannot be not undertaken, since we feel pity for discredited politicians, but because non-interference with them means the real danger with respect to our future.

The evolution of the social law of the European Union and its main legal sources

The regulations of the European Communities have covered a long distance until this day, when the Fundamental Rights Charter, which also encompasses social rights, has gained its ultimate form and may become mandatory.

The basic outlines of the contemporary social policy of the EU are specified in:

- the European Social Charter,
- the Lisbon Treaty,
- the Fundamental Rights Charter of the European Union.

In the beginning, the rules of the European Communities were directed at the elaboration of a uniform regulation with respect to the social sphere. By today, however, this principle seems to have been abandoned. The three essential areas to be harmonised are: overcoming unemployment, improvement of the conditions of existence and of labour, guaranteeing the participation rights of social partners.

The *Social Charter* sets forth working guidelines for the parties concerned and cannot be regarded as a severe regulation, because it expects the acceded state parties to take the necessary measures dependant on their current economic performance.

Social policy belongs to the scope of tasks, which do not pertain to the effect of Article 3 of the Lisbon Treaty specifying the exclusive authority of the EU, or to the effect of Article 6, which specifies the tasks, with respect to which the EU has authority for the implementation of measures supporting,

harmonising or supplementing the measures of the member states. These documents, like the documents of the EU generally need to be interpreted in harmony with each other. Nevertheless, the 2007 version of the Fundamental Rights Charter of the EU further specifies the fundamental rights provisions of the Lisbon Treaty, thereby, it may take effect together with the Lisbon Treaty.[6]

The Fundamental Rights Charter is a "formation", which defines the working framework of social provisions, nevertheless, the fact that it was framed has great significance, since *it is a modern formulation of subsistence, social security and sustainable life quality, which, although neither detached from the system of economic conditions, nor impassive in a social sense, contains a catalogue of human rights, the enforcement of which it also facilitates.*

As to its basis and dating back to its historical origin, the current social policy of the EU is framed in the spirit of the conceptual system of the social state. In spite of that, *no meritorious endeavour obtains in the EU for the establishment of a common redistributional social system*, whereas, it intends to enforce the most important regulatory elements of social policy on a common basis. The advance of social political systems is restrained by factors, such as the significant differences among the economic development of the member states, which have increased due to the enlargement of the EU. *The developed countries of Europe manage extended and expensive social systems despite the gradual rationalisations.* Its economic conditions prevail only to a limited extent in newly acceded countries, therefore, although the continually strengthening neo-liberal tendencies (as we intended to demonstrate in the first section) have turned the former social policy, which tried to prescribe definite standards, unfounded, *a modified version of the social concept supplemented by several elements is still part of the conceptual system of the European Union.*[7]

A new social vision is emerging in the EU concerning how welfare can be most promoted in the midst of the challenges of our age. *Opportunities, access and solidarity are placed in the focus of this new approach. This vision reflects the increasingly accepted view that although, society cannot secure equal results for its citizens, we need to endeavour to promote equal opportunity more and more resolutely.*

[6] The Fundamental Rights Charter of the EU considered as a basis for the analysis here is a revised version of the Charter solemnly proclaimed on 7th December, 2000, which shall supersede the Lisbon Treaty at the time of its taking effect. (*See*, C 303/14 HU the Official Gazette of the European Union, 14.12.2007.) At the moment its future is uncertain, nevertheless, we think it is necessary to deal with it.

[7] Cf., Falusné–Szikra K.: Az EU szociálpolitikája és Magyarország (The Social Policy of the EU and Hungary). *Fejlesztés és Finanszírozás*, 2004, No 1.

The Fundamental Rights Charter contains the full scope of civil, political, economic and social rights as the first document in the history of the EU. It draws on the basic treaties and secondary law of the European Union, the Convention and its Protocols, the constitutional traditions of the member states, the adjudication practice of the European Court and the European Court of Human Rights in Strasbourg, the content of the European Social Charter and the Community Charter on the Basic Social Rights of Employees, and on various international treaties and conventions.[8]

The Fundamental Rights Charter (just as the "European Constitution Treaty", as part of which it may become mandatory) does not reflect either the labour society or Europe of the peoples, but the conceptions of the capital, of political classes and eurocracy.[9] Nevertheless: considering the power relations of global capitalism, *we need to appreciate as an apparent actuality that in the midst of these relations the charter insists not only on the requirement of European unity, but also on a modernised version of the social conceptual system.*

The essential provisions of the Fundamental Rights Charter with respect to social rights can be found not only in the expressly relevant chapter. *It can be discerned that the Fundamental Rights Charter is rather moderate as to social and related rights: it does not declare more than what suits the framework of neo-liberal economic policy without threatening the competitiveness of Europe. Nevertheless, I think that it contains the potential of the social conditions of a broader social policy (interpreted not only as the minimum of living).*

The social vision of Europe

Social challenges and the directions of finding answers in Europe

As we saw, Europe seeks solutions for social problems via new ways and new paths, while it acknowledges that certain problems occur globally and that it cannot withdraw itself from the regularities of certain economic challenges.[10]

[8] E.g., the Conventions of the European Council on Human Rights, Biomedicine and Personal Data, the decisions of the International Criminal Court, the New York Convention on the Rights of the Child, the Convention on the Fight against Corruption, the Treaty on Civil and Political Rights of the UN.

[9] *Cf.*, Szigeti, P.: Előre az Európai Unió IV. szociális pillére felé (Ahead towards the Fourth Social Pillar of the European Union). *Eszmélet*, 2004, No. 64. http://eszmelet.freeweb.hu/

[10] http://www.euroinfo.hu/europaszerver/index2.php?option=com_content&do_pdf=1&id=44

Owing to these, social processes commenced in the EU, which appeared tendentiously in each state separately, by reason of which confronting them is inevitable.

The most striking fact (as I stated in the introduction) *is that social societies have not mastered poverty, what is more, new forms of social exclusion have evolved, against which the fight needs to be taken up in new manners and on a new basis. It is basically important that the society creates opportunity* (mainly by investment in human resources) *for individuals to sustain their vitality throughout their lives*, to stand the test in the midst of challenges, and even advance as far as possible. European states seem to be aware that this does not only require solidarity, but also commitment and investment. The principal goal is basically the extension of life potentials.

It can be generally experienced, which in the future may tendentiously remain unmodified, *that in the life of each person several transition periods occur as to employment* (such as the transition between school and the workplace, various jobs and positions, job-seeking and training, the interruption of career and the caring period and between active employment and retirement). The danger of polarisation prevails between those who can cope with these difficulties and those who are unable to do so.

Taking cognizance of this, the EU elaborated a system of objectives, which is capable of making the labour market more flexible. The incentives and limitations are adjusted to this and they define the scope for action of employees and enterprises, so that they are made capable of successful adaptation to changes. Security and flexibility can mutually reinforce and complement each other ("flexible security"), thanks to which career starters can start their active life more steeled, where they can get on more easily and remain active for a longer term, since flexible transitions and simply surmountable hindrances are concomitant of their entire career.

The recognition that investment into childhood and youth is crucial as regards the improvement of later prospects is ever more prevalent. This investment is for life (investment into the future). Within this framework, special efforts need to be made in the interest of the development of childcare facilities and of educational institutions for little children, the proper adjustment of school curricula, the reduction of too early school leaving, and the solution of those difficulties that young people need to face on the labour market and with respect to accommodation and finances.

The fundamental change can be recognised that the tendentious endeavour to maintain a "job-for-life", which secures early retirement, is relegated to the background in favour of the view of "capacity for work for life", which provides various strategies for active years in retirement. This is promoted by the more

easily accessible opportunity for studying for life, flexible working hours, safe and innovative working conditions and the modern and effective mechanisms of social protection. Due to this approach, the number of those increases, for whom work is attractive and whose active life is extended. During this period, they can on the one hand accomplish their life goals, on the other hand, their living is based on more solid grounds in their elderly years and retirement pension is not the only source of it.

The consequences of the aging society are more and more apparent. *The new health and social risks have significant consequences as to the systems of social protection.* However, demographic change provides new opportunities for the spread of innovative services, products and technologies. For instance, caring for the old as a welfare service can be an essential source of growth and of job creation. From the viewpoint of life cycle, the social and financial consequences of aging necessitate taking responsibility among generations and the thorough consideration of the distribution of related costs among generations.

The active role-taking of women in work and society is still hindered by several obstacles. It implies a risk that caring tasks related to the aging of society devolve on them in an excessive proportion. It is essential that departing from its traditions, (which can by no means be called progressive), the EU abandoned the social and taxation policy based on the "man is the provider" model and shifted to the "two-breadwinning" family model, which allows for individual rights to a greater extent, both members of which can take on jobs and are capable of the proper harmonisation of professional, private and family life. The promotion of this is a task to be supported.

The priorities of the future social policy of the EU consist in the elimination of the differences in salaries between the sexes, the elaboration of taxation systems, which encourage taking on employment, the accomplishment of affordable and accessible forms of caring for children and the old, the establishment of "family-friendly" circumstances, which secure a more flexible order of leave at workplaces during the whole life. At the same time, these measures contribute to the tendency that more employees remain steadily in active life and that the risk of poverty is reduced.

Active integration (in the sense of integration into society) and the enforcement of the prohibition of discrimination demands financial sacrifices from the society, since it is not true, that life-prospects are actually equal in contemporary society.

Actual and equal employment opportunities, the opportunity of studying for life, welfare and health services remarkably differ in the member states of the European Union. *A significant part of the population of Europe knows the problems of poverty and social exclusion. It implies serious difficulties for the*

population to create adequate life-conditions and get a job. Since human fates are different, according measures are necessary for the solution of the respective problem. Its precondition is that a sufficient income-subsidising system necessary for warranting lives suitable for human beings obtains, at the same time it needs to be ensured that this system should not be the source of prolonged living, but it should be attached to the opportunity for (entry) or return (in)to the labour market, which can be secured by the promotion of job creation, vocational training and retraining.

Up to 44.6 million persons between the ages 16–64 (that is, *16 p.c. of the population of the EU in active age*) claims him/herself to *contend with durable health problems or disabilities.* Many of them would be willing and able to take on employment, in case adequate circumstances are secured. Although *discrimination on grounds of disability, age, religion, race, ethnic origin and sexual orientation is prohibited*, they do exist and for many they are detrimental as to life-prospects.

Owing to a lot of various internal and external processes, European societies need to become more open, diverse and complex. *The acceptance of diversity, the active integration of those in the most disadvantageous situation, the promotion of equality and the elimination of discrimination are momentous priorities in the EU.*

Mobility within the EU belongs to the fundamental rights of citizens, since free movement within the EU is a recognised feature of more integrated economy. More and more people resort to this, if they have the opportunity. Although, Europe reckons with a new wave of migration, which is in a sense necessary for Europe to cope with challenges incurred by the aging and decrease of the population with capacity for work. These waves may be more stirring than traditional waves of migration and the number of people abandoning their homes and then returning there will continually increase. This will result in more open, diverse and complex European societies. For the promotion of an easier integration of migrants, new and prospective approaches are needed, which place the emphasis on mutual respect based on the two-directional process of exercising rights and complying with obligations. Active participation in collective activities such as culture, sports and politics reinforces the coherence and solidarity of European communities, therefore, it is a good instrument of the struggle against the dangers of division and isolation.

Voluntary work and commitment to the civil movement may have prominent roles in the reinforcement of social cohesion. In contemporary Europe, cultural exchange is as lively and vigorous as never before. By reason of the growth of free time, the demand for new cultural products manifests itself more powerfully than ever before. The cultural diversity of Europe is the source of individual

progress and worldwide spiritual nourishment. At the same time, this has an economic aspect, since innovation and creativity are important driving forces of economic activities and employment in a knowledge-based world.

The role of the European Union

In several areas of social policy, the different policies of the member states, the diversity of practice and the heterogeneity of national institutions speak against harmonisation. Nevertheless, the purpose of action in the interest of common goals is extraordinarily sweeping. Therefore, in several political areas (such as employment, social inclusion, social protection, education, youth, culture, healthcare and the integration of immigrants) *the EU has framed common objectives with different timetables, reporting mechanisms and indexes, which serve monitoring progress and comparing long-standing practices.*

The responsibility of member states is noteworthy with respect to taking the necessary political steps so that this vision comes true. The strength of the European Union consists not only in the common scale of values, but also in common action, during which the member states jointly endeavour to achieve results. The reform treaty also contains a horizontal social clause, which highlights the commitment of the EU to employment and social protection and reinforces the role of regions and social partners as part of the political, economic and social arrangement of the EU.

The experiences of the European employment strategy introduced 10 years ago, which also constitutes an essential pillar *of the Lisbon strategy,* demonstrate that these mechanisms are able to result in positive changes, place those priorities in new light that were formerly not attached prominent significance on an EU-level. These are the issues of "flexible security", the quality and productivity of work, childcare, immigration, illegal employment and of the situation of minorities. These processes undergoing for several years are considered successful, since they have facilitated for member states to determine common objectives. However, they have proved to be less successful as to the encouragement of political efforts necessary for reaching these common goals.

The EU has needed to think it over and to think continuously further how to make these processes more dynamic and how to facilitate in view of traditions that efforts concentrate more on implementation and the diversity of institutions.[11]

[11] For instance, the approach based on "common principles" applied in the case of flexible security would be adequate for the promotion of the active integration of persons most distant from the labour market with the most far-reaching respect for national

For the period 2007–2013 up to 75 billion EURO has been assigned to the European Social Fund (hereinafter: ESF), due to which those in active age can obtain new capabilities and enterprises can build up innovative work systems. Besides, upon the initiative of the Committee, *the European Globalisation Fund* was established to promote the reintegration into the labour-market of workers who are made redundant on account of the transformation of global commercial customs. This fund is a remarkable manifestation of solidarity for those affected detrimentally by the consequences of globalisation. These persons need to be offered actual preventive and active measures, which will help them in adjustment and progress.

The Committee launched a debate concerning the future of the European budget after 2013. It is important that the results of the current consultation on social relations should be integrated into this debate. The EU has an important role as to the definition of key issues, pressing negotiations and securing the political impetus necessary for common European challenges. Such negotiations are promoted by The European Year of Equal Opportunities for All (2007), The European Year of Cross-Cultural Dialogue (2008) and The European Year of Struggle against Poverty and Social Exclusion (2010).

The evolution of consciousness and the analysis of social questions are often hindered by the lack of complete and up-to-date EU-level statistics and indexes. The collection of comparable data is necessary and poses a serious task further on. Nevertheless, these data are indispensable for decision-makers, so that they can provide adequate information for open discussion and assess the social effect of initiatives.

Several foundations and agencies (the European Foundation for the Improvement of Life and Working Conditions, the newly established the European Agency for Fundamental Rights and the European Institution for Equality between the Sexes) promote the information of decision-makers and those concerned. The more regular consultation and the convocation of independent expert bodies (including the experts of countries outside the EU) are good methods for reinforcing scientific bases and enlivening European political debate.

As to its principles, the renewed Social Agenda issued in July, 2008 builds on former experience.[12] This array of concepts is guided by the principles of

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characteristics and member state authorities. Besides, it seems that greater attention has to be paid to securing coherence among various co-ordinational processes (e.g., the Lisbon strategy, the strategy of sustainable development and programming structural bases).

[12] As a source, I used the Europe-server, which is accessible on the following homepage: http://www.eubusiness.com/Social/renewed-social-agenda/

solidarity, success and opportunity. Tasks of high priority include the freedom from discrimination, the improvement of the situation of young people and women, the reinforcement of patients' rights and further approaching the school systems in the interest of migration and mobility.

The EU intends to further approach its objectives to reality. An important basis of this is taking those surveys into consideration, which were carried out among the population in the member states and which will be used during negotiations with the member states concerned for the elaboration of sets of action.

The social effects and the effects on employment of the current crisis will in all certainty incur a graver situation, therefore, efforts at all levels need to be expedited in the interest of intervention against unemployment and a fundamental reform of the systems of welfare aid, healthcare and public health.

The rapid growth of unemployment threatens with more unemployed than at any time since World War II, therefore, the EU convened an extraordinary Employment Summit.

With the decline of economy, the rate of the unemployed in the EU27 rose from 8.1 p.c. (February) to 8.3 p.c. (March). At present, there are 20 million unemployed in the EU, which is four million in excess of the datum last year. In the Euro-zone, the rate of unemployment increased from 8.7 p.c. to 8.9 p.c. However, the worst is probably yet to come. According to expectations, the rate of unemployment in the Euro-zone may reach 11.5 p.c. by the end of 2010: such a high rate of unemployment has been unprecedented since World War II.

The subject matter of the Employment Summit held in May, 2009 was remarkably topical: In March, more than 600,000 people lost their jobs in the EU and in recent months, there have been protests by reason of the social situation in several countries.[13]

According to the speeches delivered at the Summit, companies could consider the reduction of the working hours of employees instead of prompt dismissals. The employees could spend their relieved free time on the acquisition of new capabilities. Some companies in Germany have already introduced this method.

Besides, companies should employ more trainees, which would promote that young people (especially secondary school and college graduates) take a firm stand on the labour market. At the moment, more than 17 p.c. of young people under 25 is unemployed (which is the double of the average rate of unemployment) and according to estimations, this rate in the member states can exceed 30 p.c. in the future. Therefore, education should develop the most sought capabilities.

[13] http://ec.europa.eu/news/employment/090507_hu.htm

The launch of several new enterprises should be supported, which could also improve the employment of young people and the unemployed.

The Committee put the most important proposals of the conference on the agenda of the summit of EU leaders in June.

It is impossible to impede that the crisis entailed increasing unemployment, but swift action may promote that less positions were terminated and that millions of people found new and better employment.

The current programs of the European Social Fund support annually 9 million people, merely in 2009 10.8 billion Euros has been made available in the form of support via the Fund. The Fund is accessible in case of need incurred by the crisis, e.g., for the improvement of the harmonisation of the demand and supply of labour force, for the support of the common initiatives of social partners, for the encouragement of social innovation and employment partnerships and for the reinforcement of state employment services. The simplification of the rules pertaining to ESF will facilitate the prompt raise of advance payments by 1.8 billion Euros. In all cases, when ESF programming needs to be adjusted to needs incurred by the crisis, the Committee will ensure both the change of programs as soon as possible and redistribution from other funds.

Social Europe and its Hungarian lessons

The review of the social systems, objectives and achievements of the European Union demonstrates that the view that marks the system of objectives of the EU has significance beyond the traditional view of the social state. *It is a complex system, the elements of which cannot be selected one by one and seek solution for one or the other independently, because the result can manifest itself only as a co-efficiency of various state actions, which as a complex can result in the social security of citizens.* This requires new activity on the part of the state, a "comprehensive" responsibility for the concerns of society, although these concerns should not be settled by the state, but it should activate the employees in public service, demand and promote that everyone should proceed in his/her problem-solving(-handling) role."[14] In this role, *the state should activate the market and the labour market, the citizens themselves and public administration, as well.*

[14] von Bandemer, S.–Hilbert, J.: Vom expandierenden zum aktivierenden Staat (From the Expanding to the Activating State). In: Bandemer, S. (et al.) ed.: *Handbuch zur Verwaltungsreform* (Handbook to the Reform of Public Administration). Opladen, 1998, 29.

I have dealt with the details of that and since I don't intend to repeat myself, let me just refer to:

– The first scope of tasks (*activating the market*) encompasses the deregulation of the labour market and making it flexible, relieving it from commercial constraints, the taxation of enterprises and profits, the establishment of a minimum wage scheme, the relegation of measures protecting the employees and securing their participation rights into the background.

– *The activation of citizens* is promoted by driving back the elements of social security, the integration of expectations and obligations into unemployment and support schemes, the stipulation of the requirement of and the demand of training, in a summary, the integration of various elements of taking responsibility for themselves into the system.

– The tasks of public administration encompass securing the conditions of the smooth working of the market, managing the agreement, quality assurance and attestation schemes, and as an essential element, the change of the methods of financing, e.g., attaching it to achievement and making it a matter of bargaining. An according example is the financing method of expert services, in connection with which the wage elements related to social assistance in line with the related costs and overhead expenses are chargeable. A further example is the settlement of accounts according to social fields, which offers various financing according to various areas of social assistance.

It would be worth studying these forms in details, which, however, would depart from the more theoretical research included in the present study. Nevertheless, we can discern that these working and financing forms of public administration are totally dissimilar to the social working of Hungarian public administration, which works basically as a state distribution system and still does not lack the character of an authority.

Considering the whole period following the change of regime, the greatest trouble is that the social (basically arising as state) expenditure "inherited" from the socialist (Kadarean) regime could not be radically curbed or reduced more extensively by the addition of co-financing elements. The most significant question prevailing until our days has been that after the termination of the rules of obligatory employment under the socialist regime, how the living of those becoming unemployed or generally, how the social security of the members of society can be secured.

Concerning this, noteworthy debates take place not only in the society, but also on the scene of politics, but it was necessary to clarify legally how far the effect of the Constitution and social law ranges. *In this respect, the Constitution and the Constitutional Court held from the outset that the rights granted in the former social formation cannot be upheld unchanged, since they are not*

unlimited. In the adjudication practice of the Constitutional Court, the right to services and provision necessary for a living was construed as the minimum of constitutionality. This guarantees the right to human dignity which is a basic requirement. Besides the establishment of institutions, social rights are enforced via the civic rights, nevertheless, no constitutional norm exists with respect to their expanse.

In view of the bearing capacity of the national economy and the condition of the budget, the task of the state is to define the breadth of services considering that the extent of welfare services cannot fall short of the minimum level prescribed under Article 70/E of the Constitution. The abstract quality requirement of the constitutional minimum of the right to services constitutes exactly the realisation of the right to human dignity via securing a living.[15]

A well-known sociologist[16] concerned with this subject matter is trying to find an answer to the question what the reasons for the fact are that *Hungarian public administration has not undergone the decisive contentual-formal change affecting its working, which should have been accomplished so that it became adequate for performing its role directed at the maintenance of social balance under the current social conditions.* One of her principal arguments is that the process of denationalisation (desetetisation) has not undergone, what is more, in a sense the old socialist-statist methods could survive under circumstances, the political conditions of which have ceased to prevail. The author emphasises that *the structural change has not even entailed the fundamental change of the organisational system*, the working methods can be considered totally conservative and in comparison with European solution methods regarded as modern, they are by all means obsolete. One of the obvious reasons for this is that cooperation with the society has not evolved yet, thereby, *the only decisive element of the renewal of the system is the working of the parties*, which have isolated themselves to a great extent. *That is, Hungarian reality is characterised by the prevalence of party interests, aloofness from the civil sphere and the will to formally comply with the European system of expectations and requirements.*

Legal special literature has mostly dealt with this issue, when it assessed the activity of the Constitutional Court, and chronologically, when Hungary ratified the European Social Charter.

[15] Holló A.–Balogh Zs. (eds.): *Az értelmezett Alkotmány* (The Construed Constitution). Budapest, 2000, 706–709. See especially, Decision no. 32/1998, (VI.b25.) AB, which substantiates the disposition of the Constitutional Court.

[16] Szalai J.: *Nincs két ország...? Társadalmi küzdelmek az állami (túl)elosztásért a rendszerváltás utáni Magyarországon* (Aren't There Two Countries...? Social Struggles for State (Over)Distribution in Hungary after the Change of Regime). Budapest, 2007, 63–90.

The formulation of social law equalled a reform from the point of view of public administration, which has retained its basic structure, that is, the manifestation of tasks on multiple levels and their distribution among state administrative and self-governmental organs. The formation of the system of social security into self-governments had been a momentous, but inert attempt, which was followed by renationalisation after a short time. The establishment of job-creation subsidies as an instrument of active intervention can be considered to be in compliance with the European model, which, however, has not entailed a significant and permanent decrease of the unemployment rate.

The reform of healthcare has been a matter of debate for a long time. In spite of the fact that each government since the change of regime put the respective reform on the agenda, and eventually, the legal peripheral conditions of both privatisation and of supplementary insurance evolved gradually, until this day (2008), all attempts at the reduction of the number of hospital beds failed by reason of the resistance of society, primarily of the society of physicians. The outcome of the present reform (the privatisation or pluralisation of health insurance funds) as to its social effects is for the time being unknown, although, we are aware that it has not been received favourably by all the population. In this area, we can also establish that *the population acknowledges that reforms are necessary in the interest of the sustainment of the balance of society and the budget, nevertheless, it does not commit itself either to the conceptions of government or of the opposition.*[17]

The reform of the retirement pension had been launched earlier, nevertheless, by 2007 the private pension funds proved to be incapable of guaranteeing such an efficiency with respect to securing a solid living for citizens as the (distributional and imposing) pension scheme guaranteed by the state used to. This attempt did not mean more than a set of measures coerced by the state, which (or the manner of the implementation of which) didn't prove really viable. On the basis of the models rendered by European countries, more differentiated methods are necessary.

According to my judgement, the main cause of the failure (in almost all cases) consists in the fact that reform measures are supported by state guarantees, which totally contradicts the rationality of the measures,[18] since it

[17] *Cf.*, Vásárhelyi, M.: Ki nevet a végén? Reformfília és reformfóbia. In: Schlett I. (ed.): *Merre tovább Magyarország?* (Who Laughs When the Game Is Over? Reformphilia and Phobia. In: Which Way to Go on, Hungary?), Budapest, 2008. 376–426.

[18] This is valid in the case of retirement pensions as well as of tuition fee loans. The system has become market-based, which is favourable, nevertheless, it contains too many

relieves those concerned from the burden of risk and responsibility, the most important element of the enterprise, whereas it guarantees profits. Apparently, measures have been gradually taken for the prevention of early, advanced and disability retirement, which can be considered to be rather administrative than a solution bearing social content in the spirit of the EU.

Even if briefly, but we cannot fail to mention *the reform of education*, which is again permanent. For twenty years, denationalisation as a slogan prevails as to public administration, which in fact means that while the state has formally shirked its obligations as a maintainer, has actually abandoned its institutions in the spirit of autonomy. While Europe endeavours to renew education as to its content, form, quality and efficiency, Hungary is still distant from the enforcement of such endeavours in its system, and instead of the application of incentives, sometimes it employs expressly direct instruments of direction. It has been proved several times that frugality on the part of the state in this area has given rise to lavishness on the part of the institutions, not to mention that it creates little opportunity for real development for the institutions grappling with budget confinements.

Apparently, measures have been taken for the solution of specific areas of *equal opportunity*. These, according to a time-honoured Hungarian method, have obtained organisational framework, thereby, they can be reckoned up towards the EU as achievements, but for the time being, their real social effect cannot be discerned.

Furthermore, Hungary has also taken measures to simplify the foundation of enterprises by the establishment of a one counter settlement in public administration, however, anyone who tried their working knows that it can by no means called perfect.

In one of his treatises, Elemér Hankiss enumerates all the causes that special literature has pieced together as the causes of the failure of the change of regime.[19]

Almost all the authors mention *the absence of real democratic traditions*,[20] when analysing Hungarian circumstances. One of its most eloquent testimonies is that civil organisations working as the principal revisers of public administra-

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social elements to substantiate the responsibility of citizens for themselves, which is the basis of the conceptions of the EU.

[19] *Cf.*, Hankiss, E.: Átmenet – megújulás – regresszió. In: Schlett (ed.): *Merre tovább Magyarország? op. cit.* 112–188. In this treatise, Elemér Hankiss analyses the contradictions of the peaceful revolution and analyses the situation that has evolved politically and economically in Hungary as the failure of the imagined democratic establishment.

[20] Almond, G. A.–Powell, G. Bingham J.–Strom, K.–Dalton, R. J.: *Összehasonlító politológia* (Comparative Political Science). Third revised edition, Budapest, 2006, 83.

tion cannot make their voice properly heard. Although, on a philosophical and factual compromise-making level these would have significance, not to mention that they would have tasks taken over from public administration (not only on grounds of state aid).

During the recent 10–15 years, the institutions of the EU have demonstrated continually growing interest in *the dialogue with civil society*, on an EU level, as well.

The participation of civil society has modest traditions in current Hungarian society, although, the respective special literature opens up new prospects to competent participation in the social sphere, as well.[21] This is most eloquently proved by the fact that it has become a program in the Hungarian Ministry of Social Affairs, maybe as an effect of the EU. The program, however, formulates the actual opportunities for participation more narrowly than it is possible, when in decision-making it focuses on participation in law-making, whereas, in the EU essentially more is facilitated legally.[22]

A treatise on the internet analysing the civil sphere[23] demonstrates that while the number of civil organisations has considerably risen, out of these only few work in the social sphere. Their relations with public administration are marked by the fact that *the organisations that are members of the Economic and Social Council have the most opportunities.*

Science makes valuable statements as to the subject of the failure of the "welfare change of regime", when it draws the attention to the errors of the prevailing government and to the dangers which refer to overspending by the state and which shift that overspending on to the future instead of directing the processes within a real framework.

A treatise on the problematic issues of the accession of Hungary to the EU (which is only one of the many) formulates the problem of the steady deficit of the state budget as one of the most worrying concerns of the accession, which as a phenomenon has been prevalent in all of the newly acceded states.

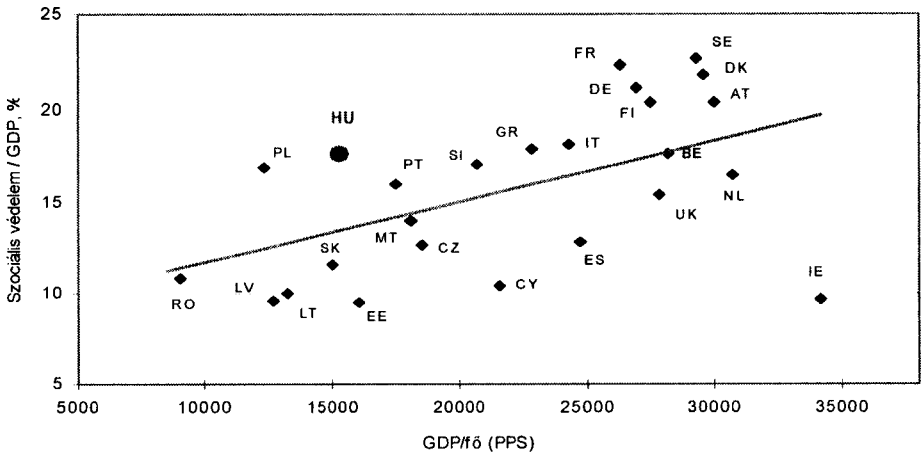
[21] Kiss, Cs.: *Az Aarhusi Egyezmény kiterjesztésének jelentősége – A felelelős részvétel elve* (The Significance of the Extension of the Aarhus Convention–The Principle of Responsible Participation) [Non-Profit Sector Analysis. Studies on the Exercise of Participational Democracy, *see*, http://www.nosza.hu/kiss.dbk.pdf]

[22] The Action Plan is accessible on the internet: http://www.szmm.gov.hu/main.php?folderID=16437&articleID=32285&ctag=articlelist&iid=1

[23] Kuti, É. (ed.): *A magyarországi civil társadalom és a nonprofit szektor helyzete, uniós kapcsolatai, fejlődési irányai* (The Situation, EU Relations and Directions of Development of the Civil Society and the Non-Profit Sector in Hungary). Expert Opinion Budapest, 2008. (Version under harmonisation, the study is a property of the Economic and Social Council.) http://www.mgszt.hu/index.php?option=com_docman&task=cat_view&gid=19&Itemid=17

The deficit of the state budget does not emerge as concomitant of the fluctuations of economy, but it is a basic structural deficiency of the post-socialist state, which derives mostly from social overspending by the state. Restrictive economic policy is not an adequate instrument for the elimination of that, because the only possible solution can derive from increasing incomes, which could substantiate the decrease of the deficit of the state budget and the coverage of social expenditure.[24]

The inherent truth of these statements is by all means justified by the graph, which shows the extremely high rate of social expenditure in a comparison of the European Union.[25]



Forrás:Eurostat-**COFOG**, 2006 (Szlovákia, Románia, Franciaország, Belgium: 2005)
A kiugróan magas GDP/fő mutató miatt Luxemburg nem szerepel az ábrán.

Chart 1. Social expenditures as per cent of GDP and GDP per capita

The graph clearly demonstrates that in comparison with our economic development, the rate of social protection expenditure in comparison with the GDP is above the average.

[24] *Cf.*, Körösi, I.: Magyarország útja az Európai Unióba – Kompország a nyugati parton (The Path of Hungary to the European Union – A Cruising State on the Western Shore). In: Kiss J. L. (ed.): *A huszonötök Európája* (The EU25). Budapest, 2005, 786–787.

[25] Source: Hungarian State Budget and Social Expenditure: A European Comparison. www.tarki.hu/hu/news/2008/kitekint/20080610_almos.ppt

András Sajó in his excellent, but staggeringly sceptical study titled "The Social Reproduction of the Troubles of the Working of the State" states the following:[26] "As to welfare services, the state has irretrievably intertwined with the society, the political and economic actors and as a captive of this intertwining, with the system providing welfare services, which is less and less maintainable. The troubles of the working of the state are entailed by this intertwining. Party policy dependencies reinforce the reproduction of state dependencies. The system of state organisation is incapable of more rational achievements not only by reason of the over-politicised and anti-initiative nature of its organisations, but because instead of reforms, the enforcement of the self-interest of quasi feudal organisations takes place. By reason of the size of the country, the evolved intertwinings do not facilitate the evolution or working of critical expertise. *The massive violation of state norms by the society and authorities is a part of the working of the state and not simply a contingent consequence. It is connected with the infringement of the norms and the institutionalisation of irresponsibility prevailing in the scope of state organs without any consequence.*"

However, that is not the only reason of overspending by the state. It entails a far greater problem that *the growth of state expenditure was not attached to actual economic and social reforms in a manner it should have taken place according to the logic of the European Union.* Even if we strip all political overtones from the statements that criticise the economic policy of the Gyurcsány government, it is appalling that all the elements of this economic policy work dysfunctionally, and in fact instead of creating a balance, it attempted to solve urgent troubles by skidded state salaries, while in fact it did not change the structural problems of economy.[27]

The inclusion of those with proper insight into decision-making processes and the establishment of the guarantees of the solidity and the stableness of institutions would be indispensable, which in themselves could ground the recuperation of confidence in the state.[28]

[26] Sajó A.: A társadalom működési zavarai és az államgépezet (Social Malfunction and the machinery of government). *Állam- és Jogtudomány*, 49 (2008) 3, 233.

[27] Cf., Gazsó, T.–Stumpf, I. (eds.): A jóléti rendszerváltás csődje. A Gyurcsány-kormány első éve. (The Failure of the Welfare Change of Regime. The First Year of the Gyurcsány Government). Budapest, 2005. 745. *See*, the chapter titled "The Main Directions of Economic Policy" 45–65. The same holds true for employment policy, which instead of improvement entailed further unemployment and thereby further increased social overspending.

[28] Maybe we don't need to prove that the organisational structure of public administration is unfortunately (several times superfluously) under continuous reorganisation, just to

Today, research concerning expressly public administration convincingly proves that public administration can be neither efficient, nor law-abiding, since its controlling and fining activity, that is, the applied sanctions are not preventive, since they encourage people not to comply with, but to circumvent the law.[29] This justifies that encouragement might be a better instrument than punishment, but the fixations of social conscience by all means contradict this. Of course, this is only one factor of the efficiency of public administration, since as we saw, it should undergo a fundamental change in its working, so that it could comply with new expectations. Not only the objectives should be *properly defined, but the paths towards them should be found within a legal framework.*

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The purpose of this treatise has been to highlight that social objectives cannot be treated as isolated from their economic and social context. We must not acquiesce in the fact that the main function of public administration, i.e., the maintenance of the balance of society requires more than efficiency in economic terms. But: more and not less! We should not risk balance by the maintenance and preservation of a social-organisational framework via overspending, which altogether contradicts the possibility of development and the sustainability of equilibrated development.

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quote one example, how many times the organ keeping in touch with the civil sphere has changed hands during the recent 10 years.

The first "Department of Civil Relations" was established in the Prime Minister's Office and was subject to the supervision of the minister of chancellery. This situation prevailed for a relatively long time. The first change supervened in 2003, when civil matters fell under the supervision of the minister without a portfolio responsible for equal opportunities. The organisational unit in this era was named the Directorate of Civil Relations, but after a short time it was rearranged as a major department subject to the supervision of the Ministry of Youth, Family and Social Affairs and of Equal Opportunities. In 2006, a new change supervened. The department in charge of the civil strategy of government and of the maintenance of civil relations was transferred to the Ministry of Social Affairs and Labour, but this time not as an autonomous major department, but as a department with a rather low number of staff.

[29] Gajduschek, Gy.: *Rendnek lenni kellene... (Tények, elemzések a közigazgatás ellenőrzési és bírságolási tevékenységéről)* [There Should Be Order ... (Facts and Analyses on the Controlling and Fining Activity of Public Administration)]. Budapest, 2008, 399.


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CSABA VARGA*

Legal Theorising

*An Unrecognised Need for Practicing the European Law***

Abstract. As a legal philosophical overview of the operation of European law, the paper aims at describing the mentality working in it by also answering the query whether the European law itself is to be regarded as the extension of some domestic laws or it offers quite a new and sui generis structure built upon all member states' laws. In either option, the connection between the European law and the composing national laws recalls the embodiment of post modern clichés, as the former's actual working (both purposefully and through its by-effects) exerts a destructive impact upon the bounds once erected by the latter's anchorage in the traditions of legal positivism. In addition, the excellence in efficacious operation of the European law is achieved by transposing the control on its central enactments to autonomous implementation and jurisdiction by its member nations. According to the conclusions of the paper, (1) the (post) positivism as the traditional domestic juristic outlook is inappropriate to any adequate investigation of the reality of European law. As part of the global post modernism itself, the European law stems from a kind of artificial reality construction (as the attempted materialisation of its own virtuality), which is from the outset freed from the captivity of both historical particularities and human experience, i.e., of anything concretely given hic et nunc. At the same time, (2) by its operation the European law dynamises large structures, through which it makes to move that what is chaos itself. For it is the reconstructive human intent solely that may try to arrange its outcome according to some ideal of order posteriorly–without, however, the operation itself (forming its construct and assuring its daily management) striving for anything of order (or ordered state and systemicity). This is the way in which the European law can be an adequate reflection upon the (macro) economic basis to which it forms the superstructure. Accordingly, (3) the whole construct is frameworked (i.e., integrated into one working unit and also mobilised) by an artificially animated dynamism. Concludingly, no national interest can be asserted in it without successful national self-positioning ready to launch it.

Keywords: philosophy of law; comparative legal cultures; the Westphalian heritage; legal pluralism; judicial methodology; grand-system functioning; order out of chaos; premodern, modern, postmodern

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1. Introduction: Queries in European and Global Perspectives

As far as challenges are concerned to find what place may Hungary occupy with her law and legal culture in the European Union after her accession to membership is concluded, first of all it seems to be suitable to trying to foresee the future in mirror of the development from recent past to the present, through a comparative historical analysis.

In accordance with this, the first item to examine is the foundational issue of the ways in which the European Union's common law issued uniformly to all its members, its administrative implementation under the promise of some well-balanced and co-ordinated uniformity, as well as its judicial application by its central law-adjudication agencies will be in the position to exert a decisive impact on either the long-term survival or the gradual withering away of the historical specificities and relative independence of the national legal systems involved. Or, as seen from the opposite side, the dilemma of partner states is in what exactly and to what extent this law of the European Union may become a genuinely and truly *sui generis* formation indeed. Otherwise formulated, how much its creation, administrative implementation and judicial ascertainment with feasible adaptation are to become captive of the giant partners fighting with one another within the Union to extend their respective (national) influence to the rest, in order that the English, German and/or French domestic traditions can eventually be transformed into one single all-European scheme. All this covers the prospects of standing divergence *versus* final convergence of the (continental) Civil Law and the (Anglo-Saxon) Common Law mentalities; the selection of the models for, as well as the techniques and future chances of, the common codification of European (private substantive and procedural, and further on) laws; the definition of the pattern(s) followed in law-adjudication exercised by the common judicial fora of Europe; and, altogether and taken as a basis, the mapping out of both the legal traditions of the participating states by delineating their historical groups and sub-groups (with past and present co-relations and changes of shift thereof) and of their chances of either ultimate preservation or perhaps sublation–in the process of and despite their continual self-adapting transformation, in the first place as to their respective sources of the law, their conceptuality, structure and problem sensitivity, as well as the techniques and judicial reasoning they use, including its canonised skills as well.

Such dealing with the above, if exhausted by filling up similar frames exclusively, would appear as suggesting some self-offer for servile copying, albeit the way open for all new-comers is by far not of one-sense in principle. For as members of equal standing by now, we cannot take as simply given from the beginning that, just as a token and independently of us as actors

(destined merely to watch the scene from a distance), in the Union's womb and through its complex chain-movement, law is getting continuously formed addressing us, too; while it is not to be taken as a self-propelling cause either that from all this some definite modification and continued change of respective domestic laws will ensue as the former's simple extension or mechanical conclusion, as in some reflex automatism. Or, just two-sensed and therefore also mutual and multi-actored this way is. Accordingly, the opposite pole of why to investigate effects will exactly be the issue, whether or not there are skills and chances hidden in our traditions, institutionalisations, particular solutions, experiences, or even practices of pressurisation, through the coming activation of which we can also assert our own interests within–and by contributing to–the European Union's common thought and institutional action in a truly creative manner and without disrespect to its overall ideality and functional complexity.

At the same time, we had better to be aware of the fact that we actually take part in the above mechanism of mutual influencing by far not exclusively with consciously pre-planned steps and patterns. For there is a brute fact, namely, the one of our relative Central & Eastern European impotence resulting from our specific historical conditions. For the region's Communist past, which spanned over nearly half a century to detach it from the daily Western European and Atlantic routine, has driven all those concerned to forced paths, diverting them from the very chance of any organic development. Or, this past made own practices developed and enforced throughout the West, against which we, Hungarians, for example, may now call back our own historical (and partly also nostalgic) remembrances (to former efforts at state-building, bourgeois revolution, liberal governance up to our involvement in the First World War, struggles between the two world wars, or, lastly, republican foundations during the short coalition period after the second worldwide catastrophe) at the most, which, however, inevitably and in the strictest sense, had also cut us off from contemporary Western European and Atlantic practices developed in their after-war recovery and afterwards, by having transformed our traditions into a historical *fore* pattern anchoring in their already distant past. That is, our ideals became in the meantime dated as mere remembrances rooted in the very past of Western civilisational patterns, forbidden and denied for us at their time, while we could hardly get own experience from their daily practices, evolved with them through nearly half a century. Therefore, eventually and in the last analysis, in both facts and ideals we are in a remarkable phase delay. For this very reason, the issue is also bound to be raised how much will our overall heritage–*nolens, volens*–affect our near future as an in-built impetus given.

Based upon own potentials, we are already both new members and constituent parts of–with shared ability also to contribute to–this unifying Europe. Therefore we are expected to answer the query for sustainability in a sensitive manner, namely, to rate what kind of future can be prognosticated for us in the dilemma of preservation mixed by mutual influences or assimilation under the pressure of overweighty partners, and also what kind of role traditions historically evolved may play in forming all this, defining its basic directions while transforming themselves into a conservative antipode in control of current adaptations, as main factors to strengthen internal forces needed so much for facing current challenges effectively and in an adequate manner.

Of course, plenty of researches have been carried out in Western Europe concerning various aspects of such and similar topics, even if in a rather isolated contexture. Neither panorama nor developmental perspective has been offered by them till now. As series of analyses within the reach of positive law and closed down in its well-established theoretical framework, they have been mostly building on their prevailing outlook as some ready-made recipe, without sensing the paradigmatic novelty of the total move which is going on anyway now with universal historical significance. Consequently, in want of own conceptualisation and methodological foundation, they have simply extended (insufficiently and by far not adequately, by the way) that what is anyhow prevalent as given in their everyday domestic routine. And still, own participation with own abilities necessitates own answers, specific of own challenges, as has ever been used in–and in a manner worth of–social sciences.

2. Basic Issues

2.1. Human Refinement

The European integration is one of the greatest victories of centuries, perhaps of millennia, as a development that may predestinate the mankind's overall fate for a long period of time. For such an institutionalisation of channels of international collaboration on a voluntary basis and launched in every step by co-operative participation is a hardly overvaluable advance in the *homo sapiens*' history. It is to note that not more than ten generations divide us from feudal particularism only, which presumed continuous group-fight with altering chances. It might result in some profit for occasional winners but it caused mostly lost (if not plain destruction) for nations and states concerned. In huge regions of the West of Europe where enemy in the proper sense (i.e., external power threatening our commonly shared civilisational values) had never menaced

survival, mostly also Christian princes, overlords sworn to the same God hankered for, or borne a grudge against, the property of their *similia*. Castles undamaged we admire in the Western hemisphere today as historical monuments are furnished with all imaginable defensive arts against those (yesterday perhaps still friend and fellow-in-arms neighbour) rounding on our life, property, spouse, and power equally, while we know that eventually no human artifice can save anyone arrived to the top on earth against the intrigue of others, aspiring with the same fighting spirit to the same arrival. Well, we may wonder at our still *pre*history of a nearly recent past, how the refinement–or self-ennoblement–of human race proved to be relative for long centuries: scarcely less than two millennia later that the message of *Christ*ianity (in company of other world religions transmitting legacies basically concordant with the above) had become the common language of our predecessors.[1]

Coming nearer to our present, just a bit more than half a dozen of generations' period separate us from the age when by force of his arms *Napoleon* aspired to found a Europe-like empire, and our parents still might live red, then brawn and yellow dictatorships that made efforts to form global empiredoms by mere power. In history, the borders of causalities and coincidences often grow dim, since in a stage of constant and mutual expansion–in a modern state of *bellum omnium contra omnes*, later in variations of waging warfare and concluding peace treaties (making place to one another in a forecalculable sequence), and, as the achievement of our modernity, hardly cramped by the so-called international law either then or since then–every state actor experiments with optimising its situation legally, by setting in sheer power techniques and by making a defensive ideology out of its actually followed practice alike (putting it as a troubling issue to the posterity whether or not in the final analysis the catch words of the *Christ*ianity, ruled by the Church's adopted politics, or, later on, the ones of democracy–that is, the attention to be paid to and by the public opinion–had been confined to this); and, with the wisdom of posterity at the most and with no little resignation–most of all *post festam*–we take notice of the fact that, with some variations in resemblance but still coming from common descendence, the same spirit of the age has materialised in one

[1] It is worthwile recalling the fact that sociological essays are used to report about re-feudalisation as a still strangely viable phenomenon also in Europe, in the very periphery of the European Union, whose stage of development is described most adequately in terms of Pierre Corneille's drama *El Cid*, reminding of the Iberian states during the 11th to the 13th centuries. Cf., e.g., Shlapentokh, V.: *Russia.* Privatization and Illegalization of Social and Political Life. Michigan State University, 1995.

of them and perhaps also in the other, maybe coming out as the winner of the given conflict.

Notwithstanding all this, it was in such a confrontation among nations that *international law* began to regain new strengths (together with its immensely considerable and varied professional branchings off by today), in line with and also resulting in the proliferation of international organisations, which were sometimes destined to become straightforwardly a legally circumscribed world state substitute, sometimes established to fulfil strictly delimited duties, considered as necessary; however, they had a common mark in that they were given a particular–and *sui generis*–legal status. Today's *American hegemony* has formed in the same way, in the world-wide interaction of giving and receiving, using all available potentials as defined by the actual challenge and the desirable response, which recontextualises also international law in a new paradigmatic situation.[2] Today this direction is coupled–if not identified with the former in its entirety, despite numerous interlocking it has–with the trend of globalisation, basically revolving around a world-economic interest. Filled with the taste of progressing in progress and bearing the purifying and self-recreating effect of the Enlightenment, not even these times might we answer otherwise the question once formulated by the Academy of Dijon, calling the farsighted vision of *Jean-Jacques Rousseau* about the ennoblement of morals, than by saying that: our instruments are constantly refined–although, and with returning generality, endeavours striving to reach the end have in the meantime become still more implacable, in result-maximalisation more inconsiderate, because by being capable of setting more refined technologies, they may envision a still by far more total effect.

What and how will be precipitated in our legal thinking and in our theorisation on law from all this? According to the shortest reply: much and little at the same time. Theoretical reflection seems to be always retarded. This is as if our earlier conditions were too forceful, since the possibilities within the prevailing frameworks are almost limitlessly able to pursue the old paths undisturbed, by adapting the known ones, and open for cautious developments. Nearly this is what we can learn from explorations into the historical logic of scientific

[2] Gooding, R. E.: Toward an International Rule of Law: Distinguishing International Law-breakers from Would-be Law-makers. *The Journal of Ethics* 9 (2005) 225–246 raises the straightforward issue that the claim of »rule of law, not of men« formulated within a state has been changed to »rule of law, not of states« in relations among states (227); however, in case of the overdominance by a superpower rosen there is hardly any guarantee for voluntary and one-sided moderation–beyond the hope that international co-operation will be effective enough to "really internalize the settled rules governing relations between »civilized nations«." (229).

development. Namely, advance is carried on within the frame of paradigms already formed; theorising upon new recognitions is achieved by gradually dissolving the tensions which are faced in this body of knowledge undertaken unchanged from the earlier period, and, this way, also mitigating them in consideration of its future; and it is only somewhen, at certain historically exceptional periods, that all this may turn to be over the limits of tolerability–moreover, most frequently not even as the necessary effect of circumstances that cannot be explained otherwise in epistemology than as the issue generated by trout-fly, secondary, merely coincident phenomena, or by external forces, or after a chance of breaking through is recognised–when, perhaps, a new paradigm will be born.[3]

Moreover, in law, the practicing of and theorisation on which is unchangedly cultivated mostly as closed within state boundaries and predisposed of the own cultural inveteracy, we ourselves seldom become cloven and duplex. Instead, we expand rather our suitable practices and habits to new territories–simultaneously as test and experiment–for that we may carry on chasing what is already *well-known* (by its further analytical exploration, synthetic re-definition in larger contexts, as well as reaffirmation in extrapolations), proceeding on on ways that are made safe thereby. It is in this sense that the present haunts. For we are inclined to see pretence, opportunity, and new experiment of extending ourselves–our past and experience–in this new European reality, rather than trying to sense, recognise and theorise it as a *sui generis* actuality, with both readiness measured by and approach adequate to it.

2.2. The Westphalian Heritage of State Law and International Law

Anyway, there is some implicitness dominating our jurisprudential thought, functioning as sieves of professional socialisation, on the one hand, and as the filtering agent of verification, on the other. It may serve as an aggregate of habitual criteria on both sides of the input and the output, defining primarily what can be thought of law.

For us, interestingly here and now, such implicitness is forwarded first of all by taking the so-called *Westphalian duo*–that is, dividing up the law's world to nation-states, ruled by domestic regimes, on the one hand, and international law, serving as the governing principle amongst such states, on the

[3] Kuhn, Th. S.: *The Structure of Scientific Revolutions.* Chicago, 1962; cf. also vom Dietze, E.: *Paradigms Explained.* Rethinking Thomas Kuhn's Philosophy of Science. Westport, Conn. 2001 & Marcum, J. A.: *Thomas Kuhn's Revolution.* An Historical Philosophy of Science, London–New York, 2005.

other–as a basis. In conformity with the latter's underlying origin, nature and operation (despite huge efforts anyway), international law is until today pulpy and fluid, rugged in all its components as forming day to day, since due to its occasionality and weakness in centralisation, it is not summed in reliably comprehensive and completed doctrine.[4] This is why now–*à propos* the *"international rule of law"*–great feelings of its defect are formulated, recognising the need of determined steps to overcome it through various forms of promotion.[5] Since it is a common experience that as soon as international power balance is split (by the practical dissolution of the League of Nations in the late interwar period or the end of bipolarity after the fall of the Soviet Union now), hegemonic interest is to prevail again (visibly *vis-à-vis* others),[6] as backed by the standing and well-known celestial solemnity of references made to superb and unchanging principles.

In turn, national laws are used to be seen in the duality of the continental Civil Law and the Anglo-American Common Law (or, in triality, as complemented to by the so-called mixed regimes), when their established technicalities, institutional networks, or firm foundations in basically developed doctrines (or doctrinal outlines) are considered. Here and now, it is not their actuality that may be seen as problematic but their unproblematic reception as something given from the outset as an exclusive natural fact. For it has some imperialistic undertone when the process of ongoing globalisation, sheltering behind all present moves, is also taken into account; when it ignores the broadening of the topics of investigations devoted to social formalisms by social theories since the beginning of the 20th century; when it features up the standing imprints of Euro-centrism or ethno-centrisms. Since the epoch of *Eugen Ehrlich* and *Max Weber*, so-called non-state laws as well as the cases of legal pluralisms, deriving from some parallel and/or concurring predominance, have also called the undivided attention of jurisprudential (legal sociological and anthropological) research.[7] Or, when we are invariably footed in the so-called Western Law, we

[4] Nevertheless, for its demand, see, e.g., Jääskinen, N.: Back to the Begriffshimmel? A Plea for an Analytical Perspective in European Law. In: Prechal, S.–van Roermund, B. (eds.): *The Coherence of EU Law*. The Search for Unity in Divergent Concepts. Oxford–New York, 2008, 451–461.

[5] Cf., e.g., Koskenniemi, M.: The Politics of International Law. *European Journal of International Law* (1990) 4–32.

[6] Cf., e.g., as a cry out, by Phelan, D. R.: *It's God we ought to Crucify*. Fiesole, 1992.

[7] For basic issues related, cf., by the author: Jogelmélet – jogi néprajz, avagy a népszokásvizsgálatok teoretikus hozadéka [Theory of law–legal ethnography, or the theoretical fruits of investigations into legally relevant folkways]. *Társadalomkutatás* 26 (2008) 3, 275–298 & <http://akademiai.om.hu/content/v778k4q3p4061h56/fulltext.pdf>.

are tempted to attribute low relevant significance to legal traditions far from us and named simply as "others", lived and living almost undisturbedly in the greater part of our globe, that is, to traditions which we consider mostly as parts of their religion but which are often the indistinguishable and by far not definitely unsuccessful parts of a comprehensive world-outlook, working well in their own traditional environment and medium. And this narrow-minded focus may have proved to be persistent with us at a time when we actually have not yet developed any truly general or, in the strict sense of the word, *universal legal theory*[8]–unless we count as such with such caricatures as afforded by *Kelsen*'s positivism (as to a European continental version), or the analytical trend (as to the British pattern), in addition to (as the historical predecessor of all jurisprudence ever undertaken) the catholicos claim for universality as offered by the philosophy of natural law.

2.3. The Place of European Law

Where can one find the place of European law? For that what may be seen from the representations of European legal literature as a synthesis is of quite uncertain contours without theoretical message, even if spiced with historico-political arguments occasionally, mostly covering or substituting to national interest pressed. Even in monographies the cacophony of incidental remarks can only assure some perspective, namely, from outside. The nationally diversified normative stuff will remain separated, perhaps with the sole exception of doctrinal propositions to prepare some common codes of the European Union. They, in turn, seem to reincarnate the idea having once prevailed in conceptual jurisprudence,[9] with abstract notionality defined within an established systemicity that is backed by the professionally shared belief in the creative force of human rationality. This is completed by the hope that constructions thusly gained will embody final rationality.

We can perhaps get a more sensitive picture by also counting with the fact that „Forging a legal Europe and post modernism are just complementary to one another."[10] For in this case, too, the multiple mediations through which the

[8] As a demand for it, cf., by the author: Összehasonlító módszer és jogelmélet [Comparative method and legal theory]. [1973] In: *Útkeresés.* Kísérletek – kéziratban [The search for a path: unpublished manuscripts]. Budapest, 2001, 97–101.

[9] Cf., by the author: Leibniz und die Frage der rechtlichen Systembildung. In: Mollnau, K. A. (Hrsg.): *Materialismus und Idealismus im Rechtsdenken.* Geschichte und Gegenwart. Stuttgart, Wiesbaden 1987, 143–121.

[10] Arnaud, A.-J.: *Pour une pensée juridique européenne.* Paris, 1991. 300. [„Élaboration d'un Europe juridique et post-modernisme vont de pair."]

formalisms in the operation of European institutions are filtered–with priority guaranteed to common institutional manifestations (directives and decisions) while, on the other end of the operational mechanism, a through and through filtration will be achieved by the national agent interpreting all these (just enabling us to conclude that, after all, neither "supranational monism" nor „centrality of domestic law" taken separately but a compromise reached by both simultaneously shall prevail[11])–push us back from the *illusory hope of certainty* to the *mere facticity of uncertainty*.

From the perspective of methodological thinking, we may perceive the same transformation process already realised in social sciences at an early stage of the 20th century, when the notional purity of rule- or statutory positivisms was corroded by sociologisms also entering the field, that is, by the positivism of facts.[12] Nurtured by earlier expectations (and not without firm grounds), all this had first imprinted minds with the fear of genuine anarchy; getting gradually replaced by a functionalist view of society, which could only take a more or less solid theoretical form after long debates on the issue of priority and attempts at final subjection, by the second half of the century. On its turn, this new concept was from the beginning based on plural actors and the endless series of social interactions, changing the mythical definitivum of some primary act, or creative intervention and final determination, to the functional interdependence of partial complexes in *actual co-operation*. This has resulted in the dissolution of legal positivism[13] while arriving at a new, relatively well-balanced state.[14]

[11] La Torre, M.: Legal Pluralism as Evolutionary Achievement of Community Law. *Ratio Juris*, 12 (1999) 2, 182–195 on 192.

[12] For the debate in *Archiv für Rechts- und Wirtschaftsphilosophie* during the years 1916 and 1917, see Paulson, S. L. (ed.): *Hans Kelsen und die Rechtssoziologie.* Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber. Aalen, 1993.

[13] Cf., e.g., by the author: What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of 'The Judicial Establishment of Facts'. In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (eds.): *Theorie des Rechts und der Gesellschaft.* Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676 and–exemplifying the positivism's dissolution in a case-study–Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada). *Acta Juridica Hungarica* 44 (2003) 21–44 & <http://www.akademiai.com/content/x39m7w437134167l/?p=056215b52c56447c8f9631a8d8baada3&pi=1>.

[14] Cf., by the author: Macrosociological Theories of Law: From the 'Lawyer's World Concept' to a Social Science Conception of Law. In: Kamenka, E.–Summers R. S.–Twining, W. (eds.): *Soziologische Jurisprudenz und realistische Theorien des Rechts.* Berlin, 1986, 197–215.

Once the certainty of all the uncertainties inherent in the state of post modernism is reflected upon the complex of European law, one can reach some points of orientation. First of all there is a striking common experience in that everything even in a loose connection to it seems to have been permeated by a kind of "missionary zeal".[15] This is characterised by both its weigh and extraordinarity, formative of the future of European history, and the fact that it lacks any strictly circumscribable subject. For today "a reactive, event-driven and context-dependent approach to EU legal studies" is the mainstream,[16] considering the fact that the "European Community law represents more evidently perhaps than most other subjects an intricate web of politics, economics and law. It virtually calls out to be understood by [...] an interdisciplinary, contextual or critical approach."[17]

The medium itself in the womb of which all this is to happen is the fluid state of ceaseless being something and becoming something else as well, since "The EU, after all, is a polity in the making".[18] The European law as it is at any given time is the first of those factors shaping the commonness in Europe at any time; and what is known presently as the European Union is the prime factor to form the European law–in an interdependence and with a mutually conditioning force that, beyond the dynamics of their mutual effects and self-sustaining output, there is almost no fix(ed) point to relate to them in the manner of *Archimedes*. Therefore one may state it without sheerly rhetorical overestimation reaching a dead-end that "there is simply no single answer to questions such as: what is the legal constitutional nature of the EU, and what is the role of the law in the governance of the EU?"[19] For all this is about the specificity of the European law's ontological nature and its self-determination through the mutual definition of the forces working in its just-so-being. Just in the way as the European law's criterial component "conditionality attached to supremacy is not a temporary aberration, but a permanent feature of the EU constitutional order."[20]–since it is also to show those apparently (self-)contradictory features that can at all be interpreted within the dynamism of the total

[15] Walker, N.: Legal Theory and the European Union: A 25th Anniversary Essay. *Oxford Journal of Legal Studies*, 25 (2005) 481–601 at 586.

[16] *Ibid.*, 583.

[17] The first time by Snyder, F.: New Directions in European Community Law. *Journal of Law and Society*, 14 (1987) 167–182 on 167.

[18] Hunt, J.–Shaw, J.: *Fairy Tale of Luxembourg?* Reflections on Law and Legal Scholarship in European Integration in <http://64.233.183.104/search?q=cache:F42D5KPUYG8J:www.sheffield.ac.uk/content/1/c6/06/90/87/Hunt%2>, 5.

[19] *Ibid.*, 21.

[20] *Ibid.*, 14.

whole, taken as a process. Even the constitutional foundations of its structure can be best described in the enigmatic but reliable language of legal and political philosophy–in the way, for instance, that the relationship between the Union and the domestic national orders is "pluralistic rather than monistic, and interactive rather than hierarchical".[21]

In the evergreen polemics of legal theory whether it is the rule that makes the law (as suggested by the transformation of *regola* into rules with the ancient Romans and by the axiomatic conceptualisation in early modern continental Europe) or the law's presence, with the quality of juridicity, will only be revealed through the judicial event (as ever professed by the experimental pragmatism of the Anglo-Saxon wisdom), there is a new contribution to the underlying issue by the conclusion, maybe shocking for the first time, according to which "The European Union's legal system has become the most effective international legal system in existence, standing in clear contrast to the typical weakness of international law and international courts." For all this is nothing but the outcome of the fact that in the political processes of the European Union the European Court(s) of Justice and the national courts have become co-actors in imposing a common will, called European law, on the governments of member states.[22]

3. Analogies

3.1. Solar System with Planets

There is a methodologically inspiring symbolic expression provided by the metaphor of "solar system with planets", based on the various forms of interaction and interdependence between the intellectual tradition embodied by the *ius commune* as the once European jurisprudents' law, on the one hand, and its local applications, on the other. According to a learned author, "*Manlio Bellomo–L'Europa del diritto commune* 6th ed. (Roma: 1993) 205-206–has used the imagery of the *Ius commune* as the sun and the *iura propria*, the legal norms of kingdoms, principalities, and city states as the planets to explain the relationship of the *Ius commune* and *iura propria*. The metaphor is perceptive and accurate. The sun is not an inert mass, without energy or gravity that does

[21] MacCormick, N.: *Questioning Sovereignty*. Law, State, and Nation in the European Commonwealth. Oxford–New York, 1999.

[22] Alter, K. J.: *Establishing the Supremacy of European Law*. The Making of an International Rule of Law in Europe. Oxford–New York, 2001.

not exercise any influence on the planets. To describe the sun as a great theoretical star in the sky that has no real life or influence of its own would be silly. On the other hand, the planets have their own conditions, forces, norms that regulate their self-contained worlds. Each planet has a different set of rules, but each is affected in different ways and from a different distance by the energy of the sun. No planet would reject the sun; it would be folly and unthinkable. The result would be chaos for the planet's system. My conclusions can be stated succinctly: The *Ius commune* was not bookish law, was not the law of the greats, to be read, savored, and returned to the shelf, was not learned law in contrast to real law. It was the cauldron from which all European legal systems emerged."[23]

Such a metaphor, I guess, can serve as a convincing analogy to describe the simultaneously centrifugal and centripetal, unending moves characteristic of the cases of legal pluralism, and most of all, the actualisation/implementation of the European law as *unity in principle*, showing certain *diversity of practice* at the same time. Otherwise expressed, this means that once some depth is actually reached by the process of European integration, there will also be some inertia and gravitational force in work as well, which may ensure that its law, independently of how it operates in fact, will also be able to exert its continued impact, feeding back, of course, the challenges it is to respond to, even if mostly in a rather indirect manner.

As it will be cleared up in the following paragraphs in more details, it is the pluri-directional move by plural actors (with the overwhelmingly massive force that is to be formed anyhow in the womb of such movements) that will specify the particularity of the operation of European law.

3.2. Pre-modernity, Modernity, Post-modernity

The amalgam that the operation of the European Union is, exhibits a variety of features ranging from premodern, through modern, to postmodern.

Premodern, insofar as it genuinely reverberates with echoes of the *ius commune* tradition.

Yet, at the same time, European law exhibits features of *modernity* as well. It carries on with the tradition of legal positivism, yet at the same time, we recognise the process of the classic nation-state being transposed rigidly into the rather different setting of the succeeding new age, in tandem perhaps with

[23] Pennington, K.: Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept. *Syracuse Journal of International Law and Commerce*, 20 (1994), 205–215 & <http://faculty.cua.edu/pennington/learned.htm>.

the potential stigmas attached to being out of date, and showing signs of being artificially produced–a result of the forceful nature of the process. Efforts and attempts aimed at producing European common law have thus far been located along more or less exclusive codification strategies, and have attributed primacy to the systemic idea,[24] and subscribe to the notion of law being susceptible to being fixed in a chosen form onto the skeletal structure provided by the formulae of rules.

Additionally, the air of *postmodernity* also permeates this sphere. This becomes tangible through the way the innumerable directives (that are not only capable of creating internal tensions among one another, but even of completely cancelling the effects of each other) are to practically overwrite the body of rules comprising European law. The fundamental cause of this reversal is that these rules are only enforceable through actualisation by the courts, that is, via adjudication governed by value judgments and the weighing of conflicting interests, which are essentially authoritative proclamations produced in decision-making scenarios.

This is a postmodern construct, accepting the primacy of principles over rules to the extent that, for example, the equality of languages natively dissolves in the cacophony of regulations that which (although in and of itself can be perceived as merely text) may nevertheless no longer be monocultural even in its simple textuality, since it is floating above the individual culture specific languages of all member states. Also to the extent that the community actions are–intentionally, due to one of the most fundamental principles determining the nature of this construct–subjugated to the various specific interpretations (arbitrary choices) produced by member states based either on powers afforded by a status of local autonomy or other powers exclusive to the given jurisdiction. Also to the extent that, by extending the freedom of the choice of the law, it gives rise to the coexistence of competing national forums, which combined with the freedom of contract and of enterprise ultimately gives way to a certain favoured legal system (or systems) gaining monopoly status along with the other (or others) becoming hollow from a practical perspective (since even their remaining degree of sovereignty is thusly rendered inconsequential). In other words, also to the extent that although the powers of the national (as in member state) entities are theoretically preserved, nevertheless, in the practical realm, a continent-wide globalisation has (already) been put into motion by practically almost fully liberalising the marketplace of initiatives and allowing freedom of choice among the various relevant legal regulations. Consequently,

[24] For their variegated adventure, cf., by the author: *Codification as a Socio-historical Phenomenon.* Budapest, 1991.

the potential outcome of this process could be that in fact the status of the state may soon become largely nominal indeed–because of the freedom of enterprise and of commerce. The reason for this is that in the case of giant commercial enterprises comprised of freely constructed concentrations of influence that are the most successful in the battle to acquire the largest market share, the *de facto* force upholding order increasingly resides with the players themselves, as their legal agreements tend to designate as arbitrators of their potential legal wrangling certain agencies commissioned to act as forums producing rulings on their disagreements. When the relevant provisions are composed with an appropriate level of sophistication, it is even possible to create a legal construct, whereby even the courts of the European Union may end up having a rather limited practical influence over these paralegal or non-legal procedures.

4. The Structural Pattern of the European Law

4.1. Legal Culture of the European Union

Well, using a multi-tiered image of the potential wholeness of law,[25] it is possible to distinguish three different layers:

law
surface level (legal rules, case law, etc.)
legal culture (legal concepts, general principles, lawyer's methodology)
deep structure

and strange as it may sound, our conclusion is that so far the legal setup of the European Union appears to have reached only the first level.[26] To put it differently, the culture and core structure of European law, i.e., its conceptual, theoretical, and methodological assets, and its doctrine (in the sense of a

[25] Tuori, K.: EC Law: An Independent Legal Order or a Post-modern Jack-in-the-Box? In: Erikson, L. D. et al. (eds.): *Dialectic of Law and Reality*. Readings in Finnish Legal Theory. Helsinki, 1999, 397–415 at 403.

[26] Wilhelmsson, Th.: Jack-in-the-Box Theory of European Community Law. In: *Dialectic of Law... op. cit.* 437–454 at 449.

Rechtsdogmatik) have not been fully formulated, its wholeness has not been attained by far.

Truly, that which is commonly referred to as the *objectification of law*[27] has been present for quite a long time, and it has materialised in the form of a solid amalgam block of a rather chaotic composition. The contracts concluded with the European Union, the directives and other positive sources of law emanating from the representative and governmental bodies representing the European Union, furthermore, the corpus of its own juridical rulings–beyond the transposed and adopted elements, i.e., in addition to the body of *acquis*–has objectified the law. Nonetheless, to this day no palpable certainty or generality has evolved out of this: neither do we see an already crystallised form of legal conceptualisation, nor do we notice a strategic construction happening along a set of principles producing a balanced construct, and even whatever could be understood as being a more-or-less consensual methodology is lacking from the process.[28] And certainly, in the absence of all of these obviously no genuine doctrine exists, unless we consider this term to cover even those compendia released by authors (which are subject to being revised or rewritten with perhaps daily frequency), that seem to report every single development structured in whatever form of a grouping, and which tend to be rather void of genuine thought regardless of being produced under the guise of bona fide science.

Still, the stuff comprised of accumulated normative materials resembles at best–even with the best of intentions–the critical mass produced by the layers of deposits formed on top of each other left behind by a long tradition of Anglo-Saxon case-law. So it resembles an incomprehensible heap that can only be penetrated via the use of some method of creating subgroupings based on typification, which then has the effect of reducing the apparently inherent, native chaos. This can be achieved by identifying certain precedent-blocks that do in fact exhibit truly significant differentiating features when examined from a specific perspective; yet we are well advised to keep in mind that no one such structural construct should be considered absolute or exclusively valid in its given form, nor is it in any way predestinated, because using a different set of principles or method in trying to create/perceive order can produce another reasonable breakdown of interconnected units. Consequently, it would be just

[27] Cf., by the author: Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l'Ontologie de Lukács. In: *Archives de Philosophie du Droit* 25 (1980) 385–411.

[28] See, by the author: Law and its Doctrinal Study (On Legal Dogmatics). *Acta Juridica Hungarica* 49 (2008) 3, 253–274 & <http://akademiai.com.hu/content/g352w44h21258427/fulltext.pdf>.

as misguided a self-deception to call this an order or a system[29] as it would be to recognise some sort of correlation in the very formal deductive thinking applied some time ago by *Leibniz* when attempting to form the corpus of the perfect language, the total conceptual system, and the finalised knowledge (the ghost of which also resurfaced in connection with the attempted configuration/treatment of law by scientific methodology as a system in *David Hilbert*'s axiomatism-ideal[30] as being the test of genuine scientific value), which mandated that all individual components be attributed the prestige of an axiom,[31] due to what in reality was a complete lack of theorems, while with all of this would merely create the trap of self-destruction because our procedure would in fact cause the notion of axiomatics *per se* become totally senseless.

If we dared even to arrive at any conclusion based on this negation and finding of incompleteness, then our first one would obviously be that the developmental process as it stands today can only be understood as being *partial*, because in our view even its already established would-be foundations and its superstructure to be occupied are lacking: we perceive the presence of only coordinated intentions and actions, rather than that of an actually unified community.[32] We consider as the next relevant observation the notion that there is a remarkable absence of a fully developed common legal culture, which results in numerous further *retardations*, thereby multiplying the amplification of its own effect. And finally–as our third, although somewhat quietly whispered observation–we would like voice our increasingly strongly held belief that in European law–a giant conglomerate of uncertain generality (due to all of its components being fragmented by special as well as conflicting interests)–the specific details of common desires and commitments can be *overwritten by partial aims that appear to show an increasing level of independent existence*. And in this we can expect a result no better than something *improvised*: a step-by-step progress, predictable planning by default hampered by compromises,

[29] Cf., by the author: Law and its Approach as a System. *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 295–319.

[30] "I believe that all that can at all be an object of scholarly thought is, by achieving its maturity for theory-building, suitable for axiomatic elaboration and thereby also for mathematisation." Hilbert, D.: Axiomatisches Denken. *Mathematische Denken,* LXXVIII (1918) 415 [reprint in William Bragg Ewald (ed.): *From Kant to Hilbert.* A Source Book in the Foundations of Mathematics. Oxford, 1996].

[31] Cf., by the author: The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion. *Acta Juridica Hungarica* 50 (2009) 1–30 & <http://www.akademiai.com/content/k7264206g254078j/>.

[32] Just as one signal, as to sociological foundations, see De Schutter, O.: Europe in Search of its Civil Society. *European Law Journal,* 8 (2002) 198–207.

because what could otherwise be conceptually coherent progress can easily be (and predominantly is) overwhelmed by *ad hoc* answers produced with daily regularity. In other words, we have what is an institutionally well-formed giant structure, which has been filled with meaning and is furthermore operated by a well-established bureaucracy, where nonetheless we notice that the hands have been taken of the steering wheel. Consequently, individual agents are doing whatever they feel most appropriate with their powers. And unless this actually leads to some serious unexpected malfunction (materialising in a scandal as an eventual political outcome, and in a breakdown or loss of confidence in terms of the institutional operation), then we can be certain that daily management shall cover and smooth this over by keeping in or pushing into the limelight whatever current affair topic arising from the latest conflict happens to be the most appealing to the public's interest.

So *everything here is a derivative*; no single part is actually original yet– since it is not self-generating, rather all of it is generated. Or, as it is quintessentially expressed: "The law of the EU is not the »European legal culture« but the product of the European legal cultures."[33] So however hard we try we are at this time unable to locate a „common legal grammar"[34] that would be comprised of common concepts, thinking, and of uniform attitudes toward law. The sense of absence in this regard is felt across the entire community of European legal scholars. So it is no wonder then, that those turning disillusionment into positive energy (most often) tend to transpose their desire and sense of longing for wholeness into work done toward the preparation of a common European codification. This is the form in which the much-desired common law's complexity materialises, involving the fact that the foundations are unclear and the American experiment with private (model) codes and unofficial restatements of the law is untested. Mostly the path by codes, that is, the imposition of a common body of law as centrally enacted is longed for. Leeways are also searched for and the Dutch solution with the idea of (national, or individual, that is, case to case) optionality is widely proposed. Even the "Common Frame of Reference" is seen as a Trojan horse, substituting to codification while advancing its continental conceptuality and systemicity, albeit in a way deficient of working democracy. All this seems to be hold on; the fact notwithstanding that mere principles without the commonality of the underlying cultures in the

[33] Visegrády, A.: Legal Cultures in the European Union. *Acta Juridica Hungarica* 42 (2001) 203–217 on 216.

[34] Zimmermann, R.: Roman Law and the Harmonisation of Private Law in Europe. In: Hartkamp, A.–Hesselink, M.–Hondius, E.–Joustra, C.–du Perron, E.–Veldman, M. (eds.): *Towards a European Civil Code* ed. 3rd rev. ed. Nijmegen–The Hague, 2004. 21–42 at 41–42.

background cannot guarantee legal security. And although contracts are the most technical field of all relationships within the bonds of the private/civil/business law, what is hitherto elevated to a community level is mostly the chaos of casualism. All that notwithstanding, however, gradual convergence in a kind of frameworking regulation can be surely foreseen.

The situation is similar in case of the common judiciary as well. The roles and mixed styles of, as well as the various interpretations by, the European Court of Justice are overviewed so that conclusion as to the nature of pluralism and alleged juristocracy characteristic of legal operations of the European Union can be drawn. Roles in substitution to both the European Union constitution and internal law harmonisation, extended to penal law, representing the entire European Union law and order and working in the law's silence as well, undecided whether in a casual or precedential manner but striving for sensitive institutional balance all through, while testing a new large-organisation operational structure, are all at stake here.[35] Style is French-type decision making complemented to by English-type general-advocating intervention. Interpretation is complex in methods, plurilingually based, fertilising general principles with dubious certainty and foreseeability of the law in end result, as fed back by the variety of national reactions and autonomously actualising implementations eventually.

Naturally, the question may be raised, how could a fresh culture in a developmental state have its own tradition.[36] Well, as much as this kind of an observation is proposing a sensitive excuse, it is just as much based on a misunderstanding, since culture is not a matter of time period. So in culture we ought not merely look for the length of time continuum as the sign of having been canonised by a sense of tradition, it is not the mere fact of a period of time having elapsed, rather what we find more crucial is that the concept that we characterised as culture be permeated–as a native feature–by the intent to *pass tradition on.*[37] However improvisational the present state of the European

[35] Cf., by the author: Szerepfelfogások és stílusok az európai bíráskodásban [European judiciary: Roles and styles]. *Állam- és Jogtudomány,* 49 (2008) 281–315 {reprint in his *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: A Hungarian overview – in an European Union context]. Budapest, 2009. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák] & in <www.eulegal-administr.hu>, ch. VI}.

[36] E.g., Van Hoecke, M.: European Legal Cultures in a Context of Globalisation. In: Gizbert-Studnicki, T.–Stelmach, J. (eds.): *Law and Legal Cultures in the 21st Century* Diversity and Unity, Warszawa, 2007. 81–109 at 83.

[37] Cf., by the author: Legal Traditions? In Search for Families and Cultures of Law. In: Moreso, J. J. (ed.).: *Legal Theory / Teoría del derecho.* Legal Positivism and Conceptual

law is, by applying this method, theoretically we may be able to recognise those places of more intense concentration that do in fact point in this kind of a direction, and which therefore are undoubtedly identifiable as being present. Of course, the awareness of tradition building is not enough. For, as its is widely expressed, "But the European Union, like any state, needs symbols, memories and myths that can be the foci or catalysts of emotional attachment."[38] However, from another perspective–that of the nations adopting the common rules–it is worth pondering the fact that the instruments of European law tend to just be *tossed mechanically* onto the pre-existing traditional body of law without being organically integrated, or at least an attempt being made at their successful integration. For the "European rules are literally copied and inserted into domestic legislation, without even any attempt to *integrate* them into a new coherent whole."[39] And this holds the fact notwithstanding that the genuine effects shaping domestic laws can be characterised as depending upon factors on the merge of the extra-legal as all "it is less a matter of positive law than of *legal culture*." Consequently, the supposed interaction taking place in the cultural context, which is in fact defined as being based on mutual relations, will be void of plurality, and will just lead to unilateralist isolation. Furthermore, this is taking place within the framework of a process that we have to identify as something being governed by the supranational within the national as a "currently undergoing *legal acculturation*".[40] Yet, this gives us the same sense of hope we have just referred to above, because it is easy to imagine that the series of national acculturations occurring due to the "shock of globalization" shall eventually feed back into the slow formation of the whole structure. In other words, these immensely elaborate complexes include certain hidden potentials of wiggle room and influence exerting mechanisms, which are hardly discoverable in advance, yet at the same time are capable of acting counter to the forecasted directions and already settled issues to a decisive degree.

Analysis / Postivismo jurídico y análisis conceptual. Stuttgart, 2007, 181–193 & [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf> & *Acta Juridica Hungarica* 46 (2005) 177–197 & <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>}.

[38] Cotterrell, R.: Images of Europe in Sociolegal Traditions [2005] in his *Living Law*. Studies in Legal and Social Theory. Aldershot–Burlington, Va. 2008, 145–164 on 159.

[39] Van Hoecke: European Legal Cultures... *op. cit.* 87.

[40] Garapon, A.: French Legal Culture and the Shock of 'Globalization'. *Social & Legal Studies*, 4 (1995) 493–506 at 493.

In sum, culture is defined as a community pattern, a collective programming of minds. Legal culture, differentiated from mere uses and skills and attitudes, is also defined as a pattern of thinking (in construction and reconstruction continued) with a pre-selective force which, as part of the law's genuine ontology, gets shaped by each and every of us within the given culture, even if majored mostly by legal professionals. Many objectifications notwithstanding, the European Union's legal culture is deficient, reduced to surface manifestations, stimulated by mostly borrowed components. With a variety of available typifications within the Union, the issue can also be raised which of the national laws' components are getting unified and what is to remain from participating national legal cultures if their organic unities are atomised as freely selectable elements.

4.2. Implementing a Grand-System Functioning

So what we may notice then is that all of our legal knowledge acquired so far has been rendered senseless, since it has been overwritten by the way European law has been functioning. So we now have a new order, which is developing as an *open system*. Certainly, there are given cornerstones, such as values, principles, and quite a lot of rules. Nevertheless, all of these are transformed into appreciable order, and more significantly, a system with foreseeable future developmental stages programmed in advance only by their actual contemporary interpretation. Still, none of the components constituting this functioning unit are capable of serving us as a point (or points) of departure–as axioms–when attempting to describe the general nature of the range of its systemic reach, its structure, future processes launched in its name, and normatively referenced correlations thereof. In essence, this is such[41] that each and every element of it is natively contextualised and pre-positioned, that is, it in and of itself does not possess a definitive force, so it is only in some sort of flexible and transient (i.e., specifically actualised) conjunction with the others that it is capable of exhibiting definitive force. But its contextualisation and positioning are provided by its actual environment at any given time, that is, its openness toward the exterior, its strategic and tactical choices in taking on the challenges posed by the real world as its surroundings. In other words, internally it disciplines

[41] For the first, intuitive attempt at the deconstructive reconstruction of how the law is structured, see, by the author: Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context. *Acta Juridica Hungarica* 43 (2002) 219–232 <http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf> & in Moréteau, O.–Vanderlinden, J. (eds.): *La structure des systèmes juridiques*. Brussels, 2003. 291–300.

according to what is concurrent, because it deals with the questions to be answered within its relatively closed system, but mostly not in any way that would result in achieving any degree of authoritative certainty, that is, exclusivity or singularity without alternatives. It activates with the tools of forum, scope of power, and decision, with which it always closes off (reseals) its system within the realm of the here and now at any given time; however this then does not in and of itself become the root of the same or other forums, scopes of power, or decisions belonging to the consecutive phase, so the only real derivative is that the carriers of today's processes shall–theoretically and according to the notion of what is expectable–be founded on the previous system's state of systemic self-closure. This is because these cornerstones themselves are divergent: they are facing various different directions while carrying different potentials as well, that is, in and of themselves they are of significance, but they do not form a closed system, therefore its particular interpretation on any given day is always (in)formed by their continuous balancing based on unending updating.

Therefore we believe that envisioning any sort of counter-posed or perhaps antagonistic bipolar relation would be fundamentally off-target, it would precisely deny the basic idea of the European Union itself. The reason for this is that we do not see this as a case of the European entity facing off with all the national ones, rather the former is a central (directly and exclusively communal) forum existing along with those of the member states', and making decisions regarding their affairs (at least in an indirect way), while the latter are all European entities themselves. As it is being stated nowadays, the judges of national courts themselves are (or, in fact should be) obliged to conduct even the more intimate/internal affairs as European judges, in essence keeping in mind the principles governing a Europe that is becoming increasingly more integrated.[42]

4.3. With Legal Pluralism?

Legal pluralism is the case especially of the European Union,[43] "when it contains inconsistent rules of recognition that cannot be legally resolved from within the system."[44]

In order to contain and set a final limit to the process of pluralisation that had been becoming increasingly arbitrary, the European Court of Justice has

[42] Slaughter, A.-M.–Stone Sweet, A.–Weiler, J. (eds.): *The European Court and National Courts.* Doctrine and Jurisprudence: Legal Change in its Social Context, Oxford, 1998.

[43] See primarily La Torre, *passim.*

[44] Barber, N. W.: Legal Pluralism and the European Union. *European Law Journal,* 12 (2006) 306–329 on 306.

declared and has had it declared three times that it has primacy and supremacy. For, according to its founding charter, it "is entitled to definitively answer all questions of European law"[45] and, as concluded by the doctrine based on its own jurisprudence, "is entitled to determine what constitutes an issue of European law"[46] and "has supremacy over all conflicting rules of national law"[47]–without all this being by far not yet sufficient to in and of itself capable of guaranteeing that no overlapping and inconsistency occur.[48]

This is exactly the root of the hope-filled desire that if we could somehow interpret the entire European legal system's structure–and within it the ongoing dynamics created by omnipresent, unavoidable conflicts, and the *ad-hoc* system of providing the resolutions thereof–within the framework of the perspective of *limited pluralism*, then the end result could be a more controllable overall scenario. As the proposition forwarded suggests, "the pluralist model provides a comprehensive framework within which these inconsistent claims can coexist. Provided that the practical conflict within this model remains potential, and actual disputes are avoided, this can provide a stable, even a long-lasting, form of settlement." By the force of this, "It encourages the Court of Justice to interpret European law in a manner that will be palatable to national courts, and, at the same time, discourages national courts from blindly insisting on the primacy of national rules. In short, the competing supremacy claims may serve to create an atmosphere of cooperation between the courts, where each side has an incentive to strive to respect the position and tradition of the other."[49]

Well, we have every right to view–at first sight–these kinds of (and similar) attempts to find a solution as arising from a sense of paralysis, and characterise it as a valiant yet laughably Utopist; after all, it is a rather rare occurrence in history that a large structure would purposefully hinder its own process of attempting to reach what would otherwise be a state of perfection in relation to its desired rule of rationality, by incorporating structural components that create confusion and impede its own progress. But as soon as we take it for granted that the European Union–as it exists today–could only have been formed from its predecessor formations and the latter's deformities in such a way that it created its unity from the *inter-national* and the *national* (derived from the entities that are the member states) –where the former enjoys primacy, but the latter maintains the right of updating vis-à-vis itself–with only a limited

[45] Quoted *ibid.* 323, with reference *EC* Art. 234 (ex Art 177).
[46] C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* (1987) European Court Reports 4199.
[47] C-6/64 *Costa v. ENEL* (1964) European Court Reports 585.
[48] Barber: *op. cit.* 323.
[49] *Ibid.*, 328 and 328–329.

number of guarantees used as the glue, then we are forced to apply a dose of reality and be grounded in our thinking. And this then is the confirmation of the fact that this is a machine that is far from being able to guarantee smooth operation; yet it is exactly due to the structure affording its inherent forces (which are at the same time of a centripetal and centrifugal nature) a large degree of free flow and play, that an uninterrupted dynamism is present, which advances or may advance the cause of the common Europe through the contemporaneous processes behind unity and diversity–that is, those of partial autonomies grouped under the umbrella of a single overriding dominion–and through the temporal chain of solutions dissolving conflicts arising from them.

But if this is so, then it follows from this that we pose the question: *can we truly call pluralism* what we are talking about here. If it is religious commandments or ethical rules, territorial customs, mercantile *usus*es, sets of professional expectations or self-regulations of associations that fall within the system of referential gravitational pull of law, then the right of pluralism to exist is truly legitimate, because it is independently existing and operational dynamic entities that find themselves on a common platform on an *ad-hoc* basis, and here it is indeed the law (the formal positing by the status of statehood) that happens to do the referencing; but that which is being referenced, nevertheless, is contributing / may contribute its own essence and criteriality–in an unchanged state. However, European legal order–as we saw earlier–has a certain multipolar nature, whereby a few of the European Union's institutions of "»mixed« authority"–in which "the power-sharing composition [...] does not [...], in practice, work in a clear way"[50]–do in fact carry on with their legislative, executive, and judiciary tasks, but they will only be able to apply the end results thereof in a precarious structural position (addressing mostly the state institutions and citizens of the member states), where these *national* state agencies on the one hand adopt these results in one way or another (or refuse to do so by the means of some technical manoeuvre), but on the other hand, subsequently the adoption of these *community* norms become target for challenge (based on the method of adoption or the shortcomings of the adopted norms) either by other state agencies or individual citizens (or some organised group formation thereof) in front of either the national courts of the same member state, or some community level forum. So, on the one hand then, the community-level entity has no true independent life, since its only task and *raison d'être* is the represen-

[50] Torma, A.: Közigazgatás – Európai Unió – európai közigazgatás [Public administration, European Union, European public administration]. In: Szabadfalvi J. (ed.): *Facultas nascitur.* 10 éves a jogászképzés Miskolcon. Miskolc, 2001, 493–526 at 522.

tation and management of the community interlinking the member states. On the other hand, all that is derived from all this member state officialdom is not simply a reflex or projection of the centrally posited, but inevitably creative weighing and adaptation as well, which among themselves (and especially within the sphere of these acts layered on top of each other), and in conjunction with interpretations by other member states, and naturally, also in light of the general community perspective, provide a fertile ground for a series of possible conflicts to occur.

Yet still, the legal order of the European Union has no other life than the *dynamism* inherent in this. And this then, including its tensions and resolutions, continuously results in both solutions and repeated accumulation of conflicts within the institutional manifestation of what is, after all, a communal existence.

It is this complexity, and the slow and uncertain organic integration similar to the theoretical solution mentioned above (or more precisely: from the inherent *order-out-of-chaos philosophy* that is ultimately the hidden core here), that may be the reason why–until this day–it remains practically unmentioned that one of the European Court of Justice's prime function would be to foster the process of the European legal order becoming internally more coherent and functioning harmoniously, which task and the latter's completion, however, "remains under-theorized, [...] remained relatively unaffected by the rich legal-philosophical literature on adjudication".[51]

5. Theoretical Model of the Operation of European Law

5.1. Multipolarity with Centripetality and Centrifugality

The metaphor of the solar system as a sub-systemic part of the galaxy describes such a relational sphere of the masses inside–which are moving along their path amidst the relevant physical forces–that is derived from their mutually relative positioning during their continuous movement, and the organising principles and facts connected to energy, mass, and position (as basic attributes) of which are depicted by our human culture of the modern era through the laws of physics.[52] The paths of these masses are at once centripetal and

[51] de Búrca: G.: Introduction. In: de Búrca, G.–Weiler, J. H. H. (eds.): *The European Court of Justice.* Oxford, 2001. 1–8 at 3.

[52] For the development of the history of relevant ideas, cf. Needham, J.: Human Law and the Laws of the Nature [Hobhouse Lecture at the Bedford College in London, 1951] in his *The Grand Titration.* London, 1969, 299–332 as well as–for a comprehensive overview–

centrifugal–as they are at all times balanced–and are defined by interrelations derived from the given quantitative characteristics of the given positions. In the realm of sociality, with the metaphor applied to *ius commune*, we can see a different equation, where we have polyphony resulting from the centrifugal forces gradually forming national separations (started by towns, princes, etc.) within the monophony of a Christian Europe, with these forces eventually overwhelming the counterbalancing exerted by the centripetal nature of the culture justified by and justifying through the common tradition.

The legal reality of the European Union is derived from its *bipolar* structure, because when its centrally posited rules are locally integrated into practice (which is defined by the sovereignty of the nation state), this is done under circumstances whereby (and while) even law posited autonomously by the sovereign nation state is subjugated to that posited by the European Union, since the former may not go against the latter due to the latter having direct force and validity (thusly primacy); and so we get what is a somewhat altered metaphor of the solar and planetary system. In this tailor-made metaphor we have a centrifugal aspect that is merely a reaction to the (f)act of having joined the process of European integration, that is, we see a process of divergence based on the fact that even though having to give up certain blocks of sovereignty is a well-known prerequisite of joining the European Union, nevertheless, the national interest now within the European framework is making attempts at a sort of *optimal* harm-reduction aimed at rendering the effects of partially lost sovereignty *minimal*. And in this case the centripetal force is represented not by the (canon law of) "Roman" tradition of the club of Christian nobility or any other common ideology, rather it is exerted by the *uninterrupted flow of texts* composed in the row of working languages and background cultures.

It is exactly due to this *divisionalisation of sovereignty*–as this sort of structuring is derived from a constitutional level, since its source is the treaty (treaties) establishing the Union–why the theoretical possibility of *discrepancy* is natively present in even the conceptualisation of this solution. It is rather rare that we see overt attempts at finding out just exactly how far the boundaries of discrepancy lay, how much farther the walls can be pushed outwards, and neither is it common that we see a player pronouncedly rejecting these–this being against the rules. But covertly the governments and judiciaries of member states do this all the time, in a way finding an outlet for their need to experience their national independence. This is primarily so, because their constitutions

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Daston, L.–Stolleis, M. (eds.): *Natural Law and Laws of Nature in Early Modern Europe.* Jurisprudence, Theology, Moral and Natural Philosophy. Farnham–Burlington, VT, 2008.

define these truly national institutions as genuine national agencies–a definition connected to the relation of the executive and the judiciary being of a subordinate nature to the legislative. Their legal status as well as the body of law to be applied by them is provided from the single source of the legislation working within the framework of statehood. Consequently, they have a centuries-old intimate relationship with their own national law, since this is their natural habitat. And since their professional activity is subordinated to the legislative body of their own homeland, even such a scenario is possible where, in a borderline situation, is actually rooting for his or her own case, so to speak, in opposition to his or her own law.

Yet they receive the body of European Union law as (well, let us say) a mere *extra task*, a sort of chore, which merely multiplies what is an already ample body of domestic sources of law. So they usually treat these similarly to how an English judge would treat statutory instruments when simply following their own tradition: with distrust, as a sort of hampering, almost a illegitimate meddling that should best be avoided. And if this external intrusion is unavoidable, then the judge shall respect it only to the extent that he or she absolutely has to.

So to summarise: although law-making and law-application in their polarised dichotomy manifest as an external obligation for the judge, still he or she treats and respects the domestic law as his or her own, because it *is* in fact his or hers. This is in contrast to the European law, which the judge only experiences as something arriving on his or her bench in a whimsical fashion from distant outside powers beyond his or her reach, and coming in forceful and unpredictable waves, with blatant disregard for their own level of integrability. While a judge is continuously contributing to the building of the body of law formulated by his or her legislator, because the judge feels that he or she is in fact part of the process of dogmatic refinement, rejuvenation based on actualisation, with the European law the judge is not very much exuberant about the possibility of contributing to progress–among other reasons, because his or her chance to contribute is at best limited, perhaps even practically nonexistent. Therefore his or her perspective remains that of the domestic law–regardless of what happens to be the premier background of his or her particular procedure.

In any case, the model of the legal order of the European Union has, so to speak, spread the process of "law-provision" over *different tiers*–with almost as much conscious determination as *Hans Kelsen* once had, when in 1922 he revised his original stand from before WWI on law-application and imputation/ascription as a mere consequence calculation and validation, by declaring that for the *Rechtserzeugungsprozess* to actually occur, there are at least two stages needed, since the actualised (i.e., case specific) application of the

future-bound–and therefore general-abstract–posited can only take place in the context of the given specific.[53]

5.2. Order, Out of Chaos

Until the 20th century practitioners of our social sciences (including our legal science) could hardly imagine that law or any somewhat objectified normativity could in fact be effective without a positivism that treated its subject with clear definition existing behind it–so without support being provided by such an assumption of an operational order being present, which would be able to provide the state judiciary, the professional discipline, the teaching church (etc.) with grounds allowing it to clearly translate into the language of practice–and enforce with its sanctioning mechanisms that which is posited by the given normative order. It presented its operation as being mechanised in its ideology: sort of as a truly *ausdifferenziert* homogeneity (following *Niklas Luhmann*'s terminology of *Ausdifferenzierung*), thus lifting the procedures performed in the name of the above-mentioned entities above general everyday heterogeneity. So what did it do then? It lifted a conceptual order above the everyday, it has rendered itself reified, and in a somewhat alienated form it (relying on secret knowledge incomprehensible and enigmatic for the everyday person) promoted into the status of brutally unquestionable consistency and necessity that which appeared, with good reason, to the excluded layperson to be not only without convincing power, but also even an indecipherable and randomly cruel twist of fate.[54] In short: it chased chaos away in order to see order in its place. Because chaos and order are in this approach antinomies, and when faced with them, we either pick the one or the other.

It was with the arrival of 20th century sociology that we see the reformulation of the descriptive vision of society. The previous understanding of society as the conglomerate of manmade reified structures in self-propelled motion was replaced by a model that was not based on a one-way mechanicalness (as is the case with the definition above), rather, it was focusing on the spontaneous motion of concurring simultaneities, and on the continuously occurring social practice within them, on the statistical result of the motivational-battles of individuals, on interactions occurring in actuality. And surprisingly–although

[53] Cf., by the author: Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions. *Acta Juridica Hungarica* 36 (1994) 3–27.

[54] Cf., by the author: *Lectures on the Paradigms of Legal Thinking*, Budapest, 1999 and A. Conklin, W. A.: *The Phenomenology of Modern Legal Discourse*. The Judicial Production and the Disclosure of Suffering. Aldershot, 1998.

its descriptions of the micro were recording nothing but chaos (a continuous floating and state of in-between within the perpetuity of attractive and repulsive forces)–still, thanks to the development that in all of this it was, nevertheless, always and determinately searching exclusively for signs of order being created (including the details of how, along what avenues, principles, perspectives, and with what chance of success), in its descriptions of the macro it could arrive at the logical conclusion of the potential for and fact *of order out of chaos*, that is, one originating from, borne out and derived from chaos.

And it is important to note here that the theoretical notion of macro-order originating and eventually manifesting from micro-chaos is what laid the foundation of the general perspective of modern economics; modern sociology is also rooted in this perspective; and this is the theorematic fundament eventually settled on by the deconstructionist aspect of today's jurisprudence, and this latter–incidentally–is a branch of scholarship with much older theoretical foundations and developmental span than the former ones.[55]

Today's social analysts call our attention to the fact that according to the "normativist model" of the early 20th century–from *Émile Durkheim* to *Talcott Parsons*–"society after society was depicted primarily in terms of the consistency, regularity, and continuity of its system of rules and of the power of these rules to bring about behavioral conformity".[56] It was only later that the recognition has been formulated according to which "The essence of human life did not lie in following rules and in being rewarded by one's virtue but in making the best use of rules for one's own self-interest, depending on the situation". From this time on, social theories are changed in that "rules are seen as ambiguous, flexible, contradictory, and inconsistent; [...] they serve as resources for human strategies, strategies that vary from person to person and from situation to situation... Order is never complete and never can be".[57]

Well, this has the realisation serving as its foundation deeply rooted in social theory, according to which we have absolutely no criteria available to us for providing proof of "differentiating at an ontological level" among the various branches of social sciences. Jurisprudence too is comfortably floating on being propelled by its concept of normativity (the force of normative enactments, and so on), while it has absolutely no social scientific affirmation

[55] Cf., by the author: *Theory of the Judicial Process.* The Establishment of Facts. Budapest, 1995.

[56] Reynolds, N. B.: Rule of Law in Legal and Economic Theory. In: Kotsiris, L. E. (ed.): *Law at the Turn of the Twentieth Century.* Thessaloniki, 1994. 357–376 on 373.

[57] Edgerton, R. B.: *Rules, Exceptions, and Social Order.* Berkeley, 1985. 13 and 14.

that it could point to for support.[58] And this may result in cynical, apparently relativising attitudes–with the dry constatation, for instance, that "the making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing and unmaking of rules and symbols in which people seem almost equally engaged"[59]–, unless we are cognisant of the fact that this description originates from the classic author of cultural anthropology: relying on a diagnosis of standard human behaviour exactly so that she could somehow be enabled to demonstrate the nature of the eventual order rising out of the chaotic nature thereof.

Well, it is as if early on the deconstructionism of legal science seemed to have dethroned the professional tenet of legal positivism, voiding it with critique that was exposing it for what it was and irreversibly (destructively) overwriting it. In the long run, however, this seems to have produced the result of the previous static vision of order–whereby everything is rendered reified with mechanical simplicity–being replaced by the potential for *order being described as a process*, through / understood as / traced back to the attribute of the ceaseless dynamism *of fluctuating motion*. In terms of the methodology of fermenting this train of thought, it was perhaps *Ludwig Wittgenstein*, then on the one hand, the speech-act theory (as the consequence of the auto-transubstantiation of the positivist philosophy of science), and on the other hand, the cognitive sciences that played the most decisive role in contributing. As a new systemic concept this could then become the point of departure for imagining a self-organised entity that would be constructed through *autopoiesis*–that is, through a process whereby the systemic end-result features solid and confident self-identity, despite its internal governing principles having been formed along the way through a variable and protracted process. It was the English–American movement of Critical Legal Studies[60]–which, functioning perhaps as an *agent provocateur*, was questioning the underlying ideology and offering new methodology at the same time–that reshaped the landscape most effectively and to the most radical extent, yet the final conclusions were drawn (concurrently, and in terms of partial result perhaps even ahead of it) by a new legal ontology.[61]

[58] Luhmann, N.: *A Sociological Theory of Law*. London, 1985, 13, noting on 20 that "Until today there is not a single notable beginning to a sociological theory of the positivity of law."

[59] Falk Moore, S.: *Law as Process*. London–Boston, 1978.

[60] Cf. <http://en.wikipedia.org/wiki/Critical_legal_studies>.

[61] Cf., by the author: Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology. *Rivista Internazionale di Filosofia del Diritto* [Roma] LX (1983) 127–142 {& in *Filosofía del Derecho y Problemas de Filosofía Social* X, coord.

The reason for this was that the latter could raise the level of discourse onto a higher level in terms of social scientific significance, as it managed to place both the external ideological criticism (which, based on an epistemological approach, was attacking from a counter-position and aiming at revealing hidden weaknesses) and the criticism of the methodology applied by lawyers when establishing their visions of the world inside the *process-description of the actual operation of law*, thusly it could analyse the components discovered therein as true ontological entities. Since it characterised the overall social complex as it exists at any given time as it is measured by the status of self-affirmative exertion (at any given time) manifesting in the interaction of partial-complexes of natively relative autonomy that eventually form some sort of final (tendential) unity resting on an identifiable trend. And hidden inside of this we have–even as far as the operation of law is concerned–what is an obligatory prerequisite for today's economy-centred mainstream materialism: the *conflict of interests* embedded in the collision of different manifestations of legal formalism, and in those scenarios where abstract positive legal rules are applied in specific cases conjuring discrepancies in practical implementation. Nonetheless, it is exactly the legally constructed formulation of conflict-resolution and conflict-settlement within the legal professional methodology's process-reconstructions that fill the gap between–on the one hand–the lack of a truly unbroken chain of logic, and–on the other hand–the specifically unique nature of an adjudication situation (in which the adjudicator fills an irrevocably personal role of a constitutive character with an irrevocable and non-transferable personal responsibility attached to adjudicator's participation).

In all of this we can find the explanation (in terms of the legal organisation of the European Union) for what which we have introduced as the *bipolar* structure comprised of–on the one hand–the production and releasing of law by the European Union as a supranational entity, and–on the other hand–the reception and conversion thereof by the member states, and–thirdly–as the *simultaneity of randomly colourful motion* propelled by centripetal and centrifugal

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José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, 81] & <http://www.bibliojuridica.org/libros/3/1051/20.pdf>} as well as–in a systematic treatment–his *The Place of Law in Lukács' World Concept.* Budapest, 1985 [reprint: 1991], particularly Part Two, 69 et seq. For a present-day summary, cf., also by him: 'Contemporaneity of Lukács' Idea to Modern Social Theoretical Thought (The *Ontology of Social Being* in Social Science Reconstructions–with Regards to Constructs like Law)' [a closing lecture at the *III Seminário Internacional Teoria Politica do Socialismo* on *Lukacs e a emancipação humana* organised by the Universidad Estadual Paulista, Faculdade de filosofia e ciências (Marília, Brasil), 17–21 August 2009].

forces, which nonetheless has the *net result of creating order with its overall cohesive critical mass*. So which of these forces is of a *creative* nature in this precariously balanced (balancing) structure? Well, according to the above, these are, on the one hand, the explicit legislative activity of the whole of the representative institutions of the European Union, and that of its agencies empowered to produce and put law into force (manifesting in the power to enter treaties, release directives, and produce court rulings), as well as its tacit legislation (which demands recognition under the aegis of *acquis communautaire*), and, on the other hand, the reception given to all of these by the member states at their organisational-institutional levels (e.g., how they carry their validity into further spheres, how they adapt and implement them). And the *final product* of all of this is no other than something nobody has attempted to describe thus far, although this could be a sort of a The State of the Law of the European Union similar to what is recurring practice of the State of the Union in the United States.[62]

As we know from *George Lukács*' gigantic socio-ontological undertaking,[63] man's conscious identifications of aims always tend to get realised differently from the original target, as they end up being either relatively more or less, or they may simply get realised as something entirely different. And as we know also from him: this is not merely a sign of divergency, a margin for error, a human failure, a lack of a valiant effort, or perhaps that of futility, rather a fundamental fact of socio-ontology, and as such, it is the starting point of any praxis-philosophy understood as a system of social theory capable of providing/venturing to seek an actual description of practice. So the order that–*in concerto*–happens to be produced out of all of this, is exactly whatever could possibly evolve at all as the result of the free-flowing and fixed forces active in the system. Observing it at any given time, its corresponding state is then such a characteristic, in the framework, on the ground, and from the origin of which–exactly as just-so-being [*Gerade-so-Sein*] in the exclusive ontological actuality–all subsequent movements are taking place.

It is strange for us to recall today about *Engels*–who attempted to apply *Hegel*'s methodological notions to the philosophy of science of his times–just how much his multifaceted concept of dialectics (which, despite its dogmas and certain erroneous components, included at least the potential for some sense of openness in terms of prospect), rigidified, and subsequently became

[62] Cf., e.g., <http://en.wikipedia.org/wiki/State_of_the_Union_address>.

[63] By Lukács, G.: *The Ontology of Social Being* Hegel's False and his Genuine Ontology. London, 1978, Marx's Basic Ontological Principles. London, 1978 [reprint: 1982]), and Labour, London, 1980, as well as Benseler, F. (ed.): Prolegomena, I–II, Darmstadt, 1984–1986.

the scene of brutally irrefutable and inexorable (perhaps best described as automatically predestined) social processes in the Soviet version of *Marx*ism, as a materialistic theology of a kind of order, which possesses such a sense of superiority, perfection, and completeness (derived from having been successfully finalised), which is equal in measure exactly to the degree of to which it is free of contradiction at any given time. It also brings a smile to our face when we recall that it could have actually been the dilettantism of the Chinese Socialist dictator, *Mao Tse-Tung*,[64] when it came to his dabbling in philosophy (which incidentally also relied on elements of Eastern wisdom), that may have opened the eyes of the then already Sovietised Central and Eastern European region to the notion that to rebut, that is, *contradiction*, is no antonym of order. It is not anarchy, not rebellion, not counterrevolution; thusly it is neither a matter of state security. Because it is in fact not a sign of rejection (through statements), rather it is a natural sign of life, as such is the true lifestyle of any organism that is in fact actually functioning; or to use *Lukács*-speak once again: it is the phenomenal form of the quality that anything that *can* operate is performing its operation along the aforementioned line, this being a fundamental fact of existence, opposite to which there can be nothing but the denial of life (i.e., motionlessness or death).

So tension, conflict, or the fact that resolutions of issues are reached via difficult processes at any given time are not signs of dysfunction, rather these are the functionality of any truly operational system. No manifestation of a lack of order, rather it is exactly the unavoidable prerequisite for and the way of the reconstruction/reaffirmation of order (theoretically always at a higher level), which is a naturally occurring and necessary process from time-to-time, as order has to be able to provide answers to the challenges facing it and has to withstand when practical (compromise) solutions are reached at any given time, storms of expectations as well.

5.3. Practical Continuum in a Standing Flux

It is this kind of kinetic-dynamism into which we have the structuring solution for the problem that a serious portion of the European Union's legal manifestations are of a soft, rather than a hard nature integrated, that is, this law can hardly be interpreted within the static framework of formalism containing such plain polarities as obligatory / not obligatory, can be applied / cannot be applied, or valid / not valid. So all of this presents us a flexible image (i.e., a kind actually

[64] Mao Tse-tung: *On Contradiction.* Peking, 1952 & *On Practice and Contradiction.* London–New York, 2007.

not binding through its formal character) of law (allowing for ever-changing conclusions being drawn from case to case, based on the various interpretations of cases and standards dependent on context or the criterion of what is purposeful), which is an exact denial of both the classic legal positivism characteristic of our Continental yesteryears as well as that of our Socialist European yesterday,[65] since it overwrites the possibility of imagining a law of "a purely domestic character".[66] Because what it offers instead is merely *continuum*.[67] It is the most that we could discover today through an ontological reconstruction as a final truth behind the formalism and discipline-obligation of the kinetic processes of law.[68] Our supplementary factor here is, however, that those classic form-structures that have been relied on by the individual nations have by now mostly been weakened by having been integrated into the legal order of the European Union; and the professional deontology implied as its own recommends a kind of concentration (which is deconstructive in the formal sense, as it is destroying even the remaining legal homogeneity) on expressly substantial (i.e., one merely referred by the legal normative expression, but not contained therein, thus heterogeneous) contents.

In addition to the continuous presence of and reliance on the *teleological*, the other element that has also been serving as the foundation of this was the juridical formulation of the doctrine of "direct application"[69] and "indirect effect"[70] as early as a quarter century ago. However, characteristically of the professionally formulated obscure speech of the European Union, this burst

[65] It is to be noted that the kind of regulation known as *Aufgabe-Normen* [task-norms] in the East-German regime that used law as an effective means of organisation was all through criticised by the official Soviet and satellite legal policy and scholarship alike, because they set (of course) objectives without defining pre-/pro-scription and sanction.

[66] Berger, K. P.: The Harmonisation of European Contract Law: The Influence of Comparative Law. *International and Comparative Law Quarterly*, 50 (2001) 877–900 at 887.

[67] Kühn, Z.: The Application of European Law in the New Member States: Several (Early) Predictions. *German Law Journal*, 6 (2005) 563–582 & <http://www.germanlaw journal.com/pdf/Vol06No03/PDF_Vol_06_No_03_563-582_Articles_Kuhn.pdf>, 579.

[68] Cf., by the author: On the Socially Determined Nature of Legal Reasoning. *Logique et Analyse* [Leuwen] (1973) 21–78 [Travaux de Centre National de Recherches de Logique], as well as *Theory of the Judicial Process* (1995) and *Lectures on the Paradigms of Legal Thinking* (1999).

[69] "The validity of a Community measure or its effect within a Member State cannot be effected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure." C-11/70 *Internationale Handelsgesellschaft* (1970) European Court Reports 1125, 3.

[70] C-14/83 *Von Colson v. Land Nordrhein-Westfalen* (1984) European Court Reports I-1891.

into the legal order thereof in such a way, that it, on the one hand, has left it unclear to this day exactly what, when, and under what circumstances (i.e., in the presence of what fulfilled conditions) can the centrally posited overwrite that by the national legislation; and, on the other hand, it continued to maintain the national legal orders on the polar opposite side, while leaving the task to the national side to adapt or exchange the nationally posited for anything originating from the community; a process that has thusly continued to be based on domestic application, that is, on the discretion of local contemplation and interpretation. Since no other conclusion could indeed be drawn than the one according to which "the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter."[71]

It is easy for us to see, that it was the entire legal perspective of the European Union which was turned into a *pragmatic-instrumentality* instead of the primacy of any legal dogmatism in this way, being true to its ever more openly acknowledged *mobilising* function, rather than being true to its regulatory function in the classic narrow sense.[72]

It is well known that in the large structure itself, which is being built during the process of operation, beyond the directives influencing only certain limited areas, it is undoubtedly the court rulings (which also take on the task of securing the entire legal order and constitutionality) that set the milestones; with a huge number of consequential results that often set even the vision of the role of the community courts on new paths, and these results can occasionally be more dramatic than even the founding treaties concluded with the utmost formality. Consequentially in this process, as a result of the liberating effect of these factors, the authors of the European law continue down the slippery slope and tend to keep upping the ante by proposing ever-bolder ideas, thereby further eroding this *formlessness*. They draw legal conclusion from trends and

[71] C-106/89 *Marleasing SA v. La Commercial International de Alimentation SA* (1990) ECR I-4135, 8 (with reference to the case of *Von Colson* quoted above).

[72] For their antagonism in conflict periods or in succession, cf., as a case-study by the author: Lenin and Revolutionary Law-making. *International Review of Contemporary Law.* 29 (1982) 47–59.

facts of institutional developments, while the only framework provided for any of this kind of activity (regarding the role of the judiciary, the alleged dissolution of any formal-doctrinal discipline, the ultimate ideal of the pragmatic ambition capable of penetrating just about anything) is the overgeneralisation of other authors. Moreover, it is as if nobody was bothered by the fact that (whether it be a community act, or the generalisations of a free-floating intellect that we are talking about) even the bare minimum of what was regarded as a *sine qua non* even in the Socialist doctrine is absent: laying the foundation of whatever is the target of their eventual intervention with first doing preparatory work, case-studies and debates on cost/benefit analysis, and with the identification and affixing of the actual cornerstones. [73] Yet they keep skipping these steps, since we can only find a limited number of pointers about the underlying basic issue whether a precedent-type law is in fact alive or is in the process of development inside the womb of the European Union (and if so, then which type of it, which *sui generis* version of it); these pointers being certain judicial decisions of unclear status themselves, which are not overtly identified as possessing the quality of precedent, and where this quality is only identified a personal interpretation of the author, based on self-referential clues, or on consequences drawn from other clues. But if all that intuitive reconstruction can decipher out of any such signal is that–along certain fundamental material values and procedural principles, and with the insertion of certain forums–it is the *efficiency of reaching target* that is of premier importance, then we have indeed returned to reliving[74] the excitement-filled historical time of the "revolutionary honeymoon period".[75] Since this means that the state of things is such that the main area of action is the mobilisation for self-propelled social activity and the encouragement of *autocatalytic processes* (akin to grass-roots initiatives), in an atmosphere where each player is stopping the building of new boundaries at their own doorstep; a building process that, incidentally, is continuously breaking down the previously demarcated ones.

Consequently, these kinds of complex movements, including divergent motions, discernible in the legal reality of the European Union simply represent

[73] E.g., the Act XI (1987) of the Hungarian People's Republic on Law-making.

[74] Within the scope of his own research, cf., by the author: 'Lenin and Revolutionary Law-making' and–regarding its variation during the Chinese "cultural revolution"– *Codification...*, especially 239–242, as well as–in view of our subject here–'Jogi kultúránk – európai és globális távlatban' [Our legal culture in a European and global perspective]. In: Paksy, M. (ed.): *Európai jog és jogfilozófia.* Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére. Budapest, 2008, 13–42.

[75] For its first description, see Pitirim A[leksandrovich] Sorokin: *The Sociology of Revolution.* Philadelphia–London, 1925.

a certain state, that of being alive, and, moreover, as a necessary actualised form and consequence of its consciously designed multipolarity. Naturally, from an analytical perspective, ultimately it is not the presence of these factors that is of interest, rather it is the longitudinal tracking and observation of whether or not the totality of these motions exhibits the character of a singular trend when evaluated at the end of their respective time period, and if such uniform (tendential) trend is in fact identifiable, then what is the nature thereof. In other words, how does the end result likely to manifest measure up against the one that had been ideally expected at the outset; is there a need for intervention to correct the course, that is, is it called for that the future course of these be reset with the tools at hand, and if so then in what direction.

It also follows from the above that it can only be considered wishful and rather simplified ideological thinking (bordering on the Utopian), based on which the statement could be made that, based on what is undoubtedly a level of integration getting higher by the day, both the European Union and its law shall eventually reach a uniform or unified state, so to speak. Because this would not result in the coming of some *End of History*[76]–so that an eschatological synthesis could then bless our everyday reality–since never in history have we actually witnessed, as a socio-ontological reality, humankind reaching a final state of rest longed for in the form of a transcendental final arrival. So whatever is taking place now is actually not a process eventually terminating in a final uniformity, not convergence, not a final resolution, and neither is it an ultimate coming together of all the contributors in a projected future Golden Age at the end of a single path. Instead, we should likely say that in the current structure of the European Union the discrete parts (existing at any given time) preserve their state of *standing apart* while and via being diverging *components of partial units* constantly restated/reaffirmed at ever higher levels. Accordingly, the discrepancies necessarily regenerated at any given time are not so much contradictions based on the denial of something, rather they are variations forming with a relative independence on top of a principal thesis that is merely implicitly expressed (because these variations–just as in the repetitious fugal structure–express the main theme in their fragmentary quality).

5.4. Activated by Nations

However, at the same time, several further consequences result from the recognition of the above. Since in this sort of complex kinetic scenario only that gets actually realised in practice, which is effectuated and enforced.

[76] Fukuyama, F.: *The End of History and the Last Man.* New York. 1992.

Yet, it is important for us to see here that whatever we identified as bipolarity in the way the European Union's legal system is structured, carries relevance exclusively from the perspective of legal imputation/ascription, referencing, and (validity-)enforcing; but it has no real existence in terms of the sociological, and neither does it have an independent existence discernible from a disciplinal perspective of the theory of power/officialdom. Since just as in the League of Nations or in the United Nations, it is the aggregate of the constitutive member states that is the actor in acting in the name and through the institutional system of the given international entity (showing that multiplicity had by then been transformed into a common will), this has been observed as happening the same way in the history of the evolution of the European community thus far. While whatever is produced as European law in the regulatory or adjudicatory institutions of Brussels, Strasbourg or Luxembourg provides the foundation for a legally independent source of validity, one that, nevertheless, has no existence without the constitutive states. Not only because (legally) there would be no entity on the receiving end, but also because whatever even actually does appear as European law could not (sociologically) be forged without them. It is merely as consequence of the series of its establishing treaties that we can even talk about the existence of the European Union, of its institutional system, of citizenship expressing inclusion therein, and of any other. While the operative character of the nation state is a sociological reality, the European communal conglomeration of national operations is just a *legal derivation and reference*, a normatively treated conceptual web, in which the only additional reality is represented by the presence of conformity (the bare fact that conduct is in functional correlation with the posited), and behind it, it is the ideology of being European that represents an additional psyche, which can be described as prevailing (since it lands itself to being described as operational). While the Union's administration, its activity as a unit is just the *treaty-based projection of* a given grouping of *national entities*, however, lacking anything that was not already present in the composing national frameworks. We have all contributed to the construction of its buildings, it was us who recruited its functionaries, we continue to provide its funding. It, thusly, has nothing beyond what is ours. Its projections too are just whatever we ourselves have transferred to it via empowerment provided by our association. So it is the wholeness as a relative total manifested in them, each and every consent and fulfilled desire, in a peculiar transformed state, once the compromises reached as a result of cooperation allow it. And this is so even if, as result of the neophyte attraction of our time we can now locate a growing number of individuals in Brussels, in Strasbourg or in Luxembourg, as well as in international law offices who–due to having been artificially programmed or because of a personal conviction–are loyal or attached

to no nation, but to the entity that generates they themselves: the European Union. Their individual-psyche, however, is no ontological category until such a functioning psyche does not manifest as a force exerting palpable influence on our social existence, that is, until it does not appear as an independent social factor.

However, the ontological significance and practical exclusivity of the member state status grants a practically exclusive significance to the only possible forms, intensity and effectiveness of national *participatio*, that is, the optimality measured against the given nation's wiggle room in the framework of all players.

Consequently, all nations have to plan their path with conscious preparatory groundwork, including the forms and methods they wish to rely on when attempting to influence community life, while taking into account all that has already transpired in terms of strategies and tactics applied successfully/unsuccessfully within the dynamics of the total structure, and also regarding theoretical and procedural methods, value and interest related trends, and ways of national adaptation and implementation; doing all this by way of conducting prudent comparative studies (applying criteria such as whether or not the particular instance under scrutiny was a singular or historically proven solution, while also paying attention to identifying what are and are not the established notions of nationhood and tradition in the European sphere of argumentation). Naturally, as a feature of *national participation*, member states represent themselves in the European Union based in part on their successive governments, and in part by their representation in the European Parliament, the nature of which in any given term is also determined, although indirectly, by the political makeup of their national legislative body. And regardless of how deep the domestic political divisions may be in this respect, these two national sides obviously must–using a term borrowed from *Lukács* once again–manifest in a tendential (as in governed by a common trend) unity, otherwise it is inevitable that the common national interest will suffer as result of their pugnacious and narrow-minded approach missing the big picture.

And this sheds a particularly important light on the phenomenon we tend to refer to as *phase-lag* in our own Central and Eastern European legal universe as an inherited piece of reality surviving from the Socialist political system, which we have been forced to endure. In particular, this means that since WWII we have not been able to get to know directly, and consequently have not been able to familiarise ourselves with, and master the connected practical skills related to certain significant developments that have occurred in Western European and Atlantic law, as well as in the legal implementation of natively (directly) societal considerations (such as the use of referring to natural law by taking into consideration "the nature of things"; the argumentation and persuasion resting on principles and stipulated clauses; the speech

in terms of human rights and with the constitutionalisation of issues; and the open contest of values that are to be safeguarded (based on weighing the one against the other); similarly to how have been left out of the changes that have occurred in terms of how the juridical function has evolved from being a mere dispenser of official pronouncements to being the venue and tool of resolving multiplayer societal problems.[77]

And the inexorable conclusion arising from this is that from the trichotomous typology of premodern and modern followed by postmodern outlined earlier, the potential carried by the latter, i.e., the *postmodernism's instrumentality*, has essentially remained *unused* in the juridical practice of formerly Socialist Central and Eastern European member states. Consequently, our room for play has been limited to however much is afforded by modernity, which obviously results in our relative uncompetitiveness, which is a sort of innate handicap on the common European legal marketplace. So until such time that we will have reached a state of complete equality of methodology, we shall continue to be the cause of the limited nature of our own effectiveness and curtail the protection of our national interest, or we can be the (indirect) cause of these efforts being limited (or perhaps even practically defeated) by exterior forces.

6. Conclusions for the European Law as Practiced

6.1. The Ethos of the Tasks

If, and to the extent, our strategy followed so far has been determined by *unconditional integration*–as if the lack of such total integration would prevent us from enjoying the desired benefits of our new member state status–then (after the initial years of "junior" membership spent rehearsing our new role) we will inevitably have to supplement this view and bring it to a more sophisticated state, and then we have to organically reintegrate it into this new totality, by way of doing prudent work in particularly significant areas, such as the channels, procedures, methods and routines of protecting national interests. Above all, we would be well advised to get proficient at the new culture of sensibility, the command of which frees us from the tie of what is otherwise an unavoidable necessity of the legally consequential, and whereby, instead of a straight subordination, we could also engage in a *practical dialogue* therewith, and thusly maximise its potential advantages, and, at the same time, minimise certain of its aspects that may *hic et nunc* appear disadvantageous

[77] For these new forms, ways and paths, cf., by the author. 'Meeting Points...' (2003).

for us, or in the best case scenario, whereby we could turn it into the source of newly discovered advantages (using it as a sort of *anabasis*, as in the Greek dramas).

Because behind all that, in general, we find the internal intellectual struggle of the European legal thinking of our time–namely, for example: the dilemma, significance and stake, and even the sheer likelihood of convergence of the Continental and the Anglo-Saxon approach to legal regulation; the interrelation of the national-domestic and the intra-European international; the details of (voluntary and involuntary forms of) legal harmonisation and the chance for common codification; the contest of the various national heritages and their respective fixed "styles" both in common juridical work and in the creation of a new legal tradition; and also the way in which a *par excellence* independent and genuinely European legal scholarship can develop; and finally, based on which the designing of the internal structure and the generation of the substance of a European legal education has been occurring (along the line of the equivalency criteria)[78]–manifested in an (internal) contest, which–although occurring hidden in the shadow of the abstract regime of academic jurisprudence–is, in a final evaluation, a field of *competitive struggle*. Yet, we would be well-advised to be cognisant of the fact that, even on the marketplace of doctrines it is not merely the ideas themselves that are on offer; the issue of whether or not they are destined to eventually become widely recognised and accepted as consensual concepts is dependent on their overall depth (sophistication of their background), which is obviously a feature of exclusive privilege, afforded only to those national entities that have larger and more robust scientific institutions, and also, behind this, on the power of the familiar, the habitual, and also that of (special) interest covertly/indirectly reinforcing these longitudinal constants almost unnoticeably generating a sensation of comfort, as the foundational discussions themselves are also "for the most part, firmly based in national and local contexts".[79]

6.2. For Reaching an Own Future, Thanks to Own Efforts

Because, as we could see, the European colossus currently referred to as the Union is being building in the hope of putting the enormous energy potential of our continent to use, in what appears to be an unprecedentedly liberated

[78] Exactly such topics are treated by the author's *Jogrendszerek, jogi gondolkodásmódok... op. cit.*

[79] Cotterrell: *op. cit.* 158 in re of debates on European constitution making, remarking that no genuinely 'European' opinion could be heard then.

new European intellectual sphere, which has been ridded, so to speak, of historical and national restrictions. So the key players continue to be the still fallible historical particularities, since it is not spiritual ideals leading the way, rather we are still guided by the same old familiar actors, namely statehoods which have previously ended up fighting (by choice) or having to fight (due to the external will of other forces) many wars in the name of protecting their individual interests during their millennia of common history. Consequently, their separate interests even now continue to be identified in their own self, regardless of the fact that now these happen to be wrapped (sublimated) in the encapsulation format designated by the community life identified as the "European Union". What used to be a bloody conventional physical battle fought with arms has by now reached–at least in its appearances, on the surface–the more (post)modern, currently acceptable form of democratic participation, while the whole dynamics have, not surprisingly, remained unchanged, and it is still a battle of interests that is the immediate context of this reality.

These interests are largely national. Yet now these can be neutralised, altered, or rebalanced/reconstituted by local and regional (including cross-border regional, in the case neighbouring states) interests, which, from time to time, are even capable of circumventing/substituting/overtaking that which would otherwise not have appropriate form if attempted to be formulated from (within) the regular framework of nationhood. Beyond the tipping point, these traditionally structured interests (characterised as partial, fragmented, or particular) can easily find themselves on the polar opposite of the critical mass of these newly constituted gravitational centres; and these characteristically global-economic trends of cosmopolitan pervasion focused on global empire-building aspirations and the amassing of wealth, which by now have occupied a position antithetical to the once Westphalian achievement, and propose a future for Europe that is going to surpass the notion of nation-statehood (as a way of existence defined as the one distinguished from the inter-nationalist way)–doing all this under the pretext of advancing integration, but also (and in reality) under the spell of a bureaucratic (decision-making) powerhouse of a superpower, envisioning a comfortably conducive environment for the effective control of preferred market positions; doing all of this on a heap of rubble that had in its previous state been the democratic ideal (now rendered the democratic deficit), and the social concern that had once upon a time also been a basic promise, and as such, potential of the envisaged Europe.

Legal cultures are standing side-by-side in this complex. In legal terms, nation by nation they are all–individually–equal as member states, yet their chance of survival (i.e., their potential for either gaining further strength or losing significance altogether) in a historical sense, is measured by their ability to

exert influence based on their innovating power.[80] Whatever academic pathos surrounds the guesswork involved in attempting to size up the chance of European continental Civil Law and Anglo-Saxon Common Law traditions eventually fusing or continuing to exist side-by-side, the prospect of convergence, obviously, shall not be determined by its internal factors, rather it will be the net result of the individual abilities for survival, the outcome of the battle of competing intellects pitched against each other. The preparatory work of the harmonisation and codification of European common law is registered by its cultivators everywhere as academic research, in abstract vehicles, under the aegis of the principle of the universality-concept of science; while and at the same time we must also recognise that these processes occur in reality as vehicles of the direct application of legal methodologies, skills and usages, and value systems native to national background cultures, that is, as inherent part of, or serving the cause of, national expansion. Finally, the particular nation states are not merely recipients and ultimate interpreters of the central case-law produced as the output of European juridical work, but additionally–through their strategic and tactical choices applied to their official commentaries and preliminary questions and inquiries submitted–they themselves can potentially become participants in, or even movers of the processes, and thusly the constituent determinants of the future of the community.

This is because the Union's Europe is about dynamism. For almost at least two decades we have been witnessing what is apparently the relentless seething of a *laboratorie vivant* fed by a certain *jacobinisme* activism.[81] In this process we have the decisive force of the *raison économique* driving integration, which is supplemented, as *raison symbolique*, by other features as well, which are all derived and adopted from the spirit of the times, as, for example, the case may be with human rights in our situation, which in this scenario are serving as the background for the body of rules governing free trade and the free movement of goods, that is, features that function as props on the stage arranged according to the requirements of postmodern democracy.[82] And let us not miss the point that both of these legal tiers directly effect our future: they hold the key to what is the true meaning of our membership in the European Union, thusly they have a lot to do with the chain of consequences defining

[80] To note: in the posthumous *Towards the Ontology of Social Being* by *Lukács*, social existence presumes the ability and factuality of exerting influence in the social total complex.

[81] Arnaud: *op. cit.* 293.

[82] *Ibid.* p. 294.

the framework of our life. For–as termed by one of the past presidents of the European Court–„Qui participe à la Communauté épouse son droit".[83]

So the final outcome of our analysis is that there is no natively *European law*. So far we have member state nations, and currently it is only their cyclically renewed consensus (which is ideally reached via mutual compromise) that can produce the European law. They can do this in a community of nations in which each and every participant is nominally equal. Yet in practice, however, their particular size, economic wealth, and, last but not least, their level of sophistication in terms of being cultured (well versed, fluent) in the ways of Europe renders (promotes or demotes) them players with differing chances of success amid the continuity of challenges and contests. Their skilfulness, endurance, focus, and tactical affinity are being tested all the time. There are of course no losers *per se*, only players whose interests are forced from the fore. Those statehoods and nations behind them are destined for such less favourable track, which have proved to be less proactive in terms of keeping even their own dynamism alive. Or, it proves to be true and concludable in all its feasible directions to claim that "If the »new legal order« is to have reality and full meaning it cannot be simply the extension of any one constituent system to a broader field of application."[84] Instead, what we have here is the sum total of all parts, wherein only that gets included which had previously been released into the common stream of the common procedure with appropriate care and determination.[85]

[83] From the speech of President *Robert Lecourt* (1967–1976) in celebration of the 20th year of the Declaration by *Robert Schuman* in Brussels on 5 May 1970.

[84] Mitchell, J. D. B.: British Law and British Membership. *Europarecht* 6 (1971) 97–118 at 98.

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KALEIDOSCOPE

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Public Services at Local Government Level

1. Public Policy Issues

1.1. Definition of Local Public Service

According to the most widespread definition, public services serve public interests and are provided by the government. The state is often held accountable for these services. However, not all public sector services will be considered here. Some services, such as the police, the legal system, crisis management, etc. are not discussed by this study. These services are traditionally associated with the executive power of the state in Europe, although the American practice has successfully privatized some of them.

Public services can be classified as infrastructure and welfare services. The provision of welfare services is based on solidarity. In other words, the state balances the unequal effects of the market and ensures basic goods and services for those in need. Infrastructure services, such as postal nad transport services, etc. often have great capital intensity and low profitability, and several other services, e.g. the maintenance of public places, roads, etc. are not lucrative either. Given the lack of private capital, the state began to provide them in response to the pressures of necessity.[1]

Some public services seems more rational to be provided by local governments than at central level. Public services, such as the postal service, telecommunications, gas, electricity, railways, airways, and highways, are traditionally provided by central government authorities. These central public services are regarded

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[1] Bordás, M.: *A közszolgáltatások és az állam* (Public Services and the State). PhD Dissertation, Budapest, 1997. 23–24.

as state monopolies closely connected with the service functions of the state, however many of them have been liberalized in the last decades.

The argument for *shifting public services to the local level* is that local governments are more efficient at providing them.[2]

- Flexibility means that it is more advantageous to provide public services in a small area, because local governments can better adapt to changes in local needs.
- It instigates electors to get more involved in local initiatives, e.g. what public services they want, communicating that towards the local government, i.e. expressing their interests in the organization of public services.
- When local governments have the right to make their own decisions and regulate local affairs, they can easier meet the requirements of citizens. This dissolves the monopoly position of the central government.
- The provision of public services is more democratic, for the majority interest can be better manifested on the local level.
- Taxpayers can contribute to public services with local financial resources and as customers can better control provision of services.
- Elected boards of local governments can better supervise their administrative apparatus than a central public authority, in the preparation, implementation and monitoring stages of the provision of public services.
- The local management of public services offers a better opportunity for the transparent and open operation of local governments. Local governments thus become more accountable to the public.

However, devolution has not always resulted in a more democratic environment for decisions of local governments.[3] It is observed by researchers that in countries with lower level political culture and less developed civil society, influential local "potentates" can monopolize rules of democracy.

Failure of localism can occur when laws are not deregulated in order to ensure the discretion of local governments. Acts of Parliament representing central government can limit localism. One way for violating the discretion of local governments is when a local task is heavily and strictly regulated by central laws.

The right to make decisions, however, is respected when the laws determine the main requirements of service provision for the local governments. Also,

[2] Horváth, M.T.: *A helyi közszolgáltatások* (Local Public Services). Budapest, 2000. 35–40.

[3] Verebélyi, I.: A devolúció nemzetközi tapasztalatai, különös tekintettel a humán közszolgáltatásokra (International experiences of devolution, with special regard to human public services). In Fogarasi, J. (ed.): *Önkormányzati kézikönyv* (Local Government Handbook). Budapest, 2000. 25–38.

freedom to organize services on the local level is limited when a supervisory authority is allowed to strictly control activities of local governments. Instead, cooperation between central and local governments is advised.

The central government can limit the economic independence of local governments by providing targeted subsidies for them. Laws may prohibit local governments from imposing local taxes, or suppress their needs for credits.

In order to avoid these legal failures caused by legislation, constitutional regulations guarantee that certain rights of local governments should be respected by the Parliament. Rights of local governments, similarly to human rights, may not be violated by any law or government decision.

Many think that not all local public services can be provided in a small area.[4] For example, hospitals cannot be efficiently organized in a fragmented local government system. Small local authorities do not often have the professional skill to manage special local public services.

The establishment of special regional public authorities is recommended to avoid the unwanted effects of small local governments. As another example, cooperation between local governments can be mentioned to manage complex local public services.

1.2. Public Policy in Developed Western Countries

1.2.1. Political and Administrative Environment

The provision of public services as a task for the state has been strongly influenced by public administration traditions. In Continental Europe, absolute monarchies first established centralized public administration systems. Later on state intervention was limited by laws, and public administration had to work under refined regulations. The theory of the "legal state" meant at that time that these laws bound the activities of public administration tot prevent intervention in private affairs.

European theories have stressed that the public interest is better served when provision of public services is accepted as a state responsibility. The theory of "the provident state" meant that it was the responsibility of the state to ensure public services for the citizens. In Europe, public authorities are

[4] Illner, M.: Territorial Decentralization: an Obstacle to Democratic Reform in Central and Eastern Europe? In: Kimball, J. D. (ed.): *The Transfer of Power–Decentralization in central and Eastern Europe.* The Local Government and Public Service Reform Initiative, Budapest, 1999. 7–42.

responsible for the provision of certain public services.[5] Affairs of public services belonged to the public sector and were based on public law.

The American culture has always had an aversion to centralized power. This has encouraged the establishment of voluntary and charitable organizations. The individualist tradition stresses equal opportunities, which meant that it is the individual's responsibility to improve their situation by their own efforts. The provision of public services has been a matter of public policy, based on the needs and influence of various economic groups.

The American "New Public Management" emphasizes economic efficiency as a central value in the public sector. Public administration, similarly to the business sector, should be based on management principles. Instead of strict legal regulation, centralization, hierarchy and bureaucratic administration, "New Public Management" encourages private (business) administration of public services with public oversight. Public services are seen as practical tasks to be dealt with on the local level, rather than as a matter of public interest.

There is a persistent debate in Continental European literature on the question of whether the American public management approach can be applied in law-governed European administrative systems.[6] Other pressing questions include whether the law-governed character of European public administration can provide adequate public services and whether such services will be maintained in the manner intended by law.[7]

Two basic public policies have developed in western countries, as a result of debates of 1980's.[8]

The "New Conservative Public Policy" reflects the interest of the American middle class that can buy public services in the market, but is unwilling to finance the welfare costs of the poor. This policy considers state withdrawal from the provision of public services and maintains minimum state intervention. Local governments have to establish a new relationship with the private sector, so that public services should be provided under business principles. Civil society, such as charitable and self-organizing organizations are involved by local governments in the provision of welfare services for the poor. This public policy decreases redistribution in the state budget.

[5] Lőrincz, L.: *A közigazgatás kutatásának tudományos irányzatai* (Aspects of Research on Public Administration). Budapest, 1976. 78–80.

[6] Konig, K.: Public Administration–Post-Industrial, Post-Modern, Post-Bureaucratic. Paper. *EGPA Conference*, Budapest, 1996. 2–3.

[7] Waldo, D.: *The Administrative State.* New York, London, 1984. 153–154.

[8] Horváth, M.T.: *A helyi közszolgáltatások szervezése a modern államban* (Management of Local Public Services in Modern State). Unpublished Doctoral Dissertation, Budapest, 1999. 95.

The "New Left Wing Public Policy" maintains a centralized administrative system, which influences the provision of local public services. Local governments are obliged by law to provide certain local public services. The central government subsidizes local governments from the state budget by using a financial regulatory system. The level of redistribution is high in this system, which is a guarantee for the assurance of solidarity in the provision of welfare services. Other preferences, such as a regional financial system and regional development of the central government can be achieved as well.

1.2.2. Local Government Environment

Delegated model

The provision of public services is also influenced by the character of local governments. In the delegated model local governments are a part of the government system, in terms of not having their own, rather a delegated scope that is given them by the central government. The scope of local governments is often heavily regulated by laws, too, in this system. In other words, laws strictly determine the activities of local governments, so local governments can act only if laws entitle them to do so.

In the delegated model the central government controls local governments by limiting their financial accountability. To achieve this goal, the state subsidizes local public services with targeted and addressed grants from the state budget. Local governments have little freedom to make decisions on the provision of public services based on local needs. A central financial regulatory system aims to balance any inequality of local governments by giving grants from centralized appropriations for specific purposes.

Political issues are not emphasized in the delegated model, because local governments have less political power in this system. Instead, the servicing function of local governments is strengthened by the extension of local public services to be provided by local governments.

The delegated model of local governments has in most cases evolved in the centralized, law-governed public administration systems. This model is typified by the bureaucratic organization of local governments. Organization of local governments is based on hierarchy: local public services are provided by local government institutions as a part of the organization of local governments.

Decentralized model

In the decentralized model local governments are regarded as local political power with their own scope to decide on certain local issues. Local governments have their own financial responsibility, too, which means that they have the

right to acquire financial resources by imposing local taxes and having other income, such as business-like activities, privatization, etc.

The central government encourages local governments to learn alternative ways of providing local public services in this system. This means involving the civil and the business sectors into the provision of local public services and the establishment of an interactive relationship with them. The emphasis is laid on management principles in the decentralized model, which implies the requirement of efficiency in the provision of local public services.

Economic efficiency should be achieved when public services are managed by local governments. Managers of local governments are accountable to the citizens as taxpayers to efficiently use public money. Local governments are often expected to cut their budget and staff in order to decrease local taxes to be paid for local public services. Citizens, self-organizing bodies have a strong incentive to participate in the decision-making process of local governments.

Taxpayers are regarded as customers and local public services as goods. Local governments are expected to provide local public services at the lowest price and the best quality. Customer choice should also be assured by providing differentiated services. General availability of the services has less importance than in the delegated model, but the emphasis is on customer satisfaction.[9]

Local public services are typically organized by local governments, and provided by business firms, non-profit or charitable organizations. Market principles, such as competition, invitation of public tenders, market prices, profit-oriented firms, etc. are often used in the decentralized model. Local governments operating in this system are minimally regulated by laws, which specify exactly how and in what manner local public services ought to be provided. Although, public policy has high expectations of local governments to find the best way for meeting the requirements of citizens.

1.3. Public Policy in the Post Communist Countries

1.3.1. Changes of Local Public Services

The Communist states aimed to equally care about the needs of citizens, regardless of their contributions. This is called the "paternalist" philosophy of the communist state. During the Communist era, public services in Eastern European countries served as part of the wealth redistribution system of the state controlled

[9] Osborn, D.–Gaebler, T.: *Reinventing Government. How the Entrepreneurial Spirit is Transforming the Public Sector*. Budapest, 1994.

economy. The Communist state ensured the welfare of citizens by dictating how certain goods and services were to be provided to the general population.

Not only were welfare services provided free of charge, but below-market prices for goods such as foods, flats, and utility services were also established and subsidized by the central government.

Communist budgets served the interest of production more directly than the interest of welfare. For example, they often subsidized loss-making state-owned enterprises. Until the 1960s the so-called "bureaucratic redistribution"[10] based on a macro-economic plan meant that markets existed only on the periphery of the economy. Central planning, state investments, and bureaucratic allocations prevailed. Starting in the 1960s, however, market allocations gained precedence.

When that system disintegrated after the transition in 1990, a small portion of the society became wealthy, but most became increasingly poorer. This special market produced a new entrepreneurial class that has obtained great wealth and a political elite that has achieved great power. The interests of these two elites are often able to suppress what remains of the bureaucratic state redistribution system.

Recently, groups whose incomes were provided historically by the state bureaucracy have found themselves at tremendous economic disadvantage. The guarantee of low incomes and subsidized basic goods and services, such as food, homes, utilities and health care under communism have disappeared.

With the privatization of state-owned enterprises and the creation of open market institutions in the post-Communist era, a "grey economy" prevails and the state budget is under great pressure.

In post-Communist economies there is a pronounced pattern among the entrepreneurial class of successfully avoiding the payment of taxes and social insurance. As a result, the state budget is further depressed. The reaction of the government is to further increase fees and taxes, which, ironically, even more encourage people to avoid paying them.

The political elite and "newly rich" argue that costs of certain public services shouldered by the state in the former Communist regimes are far beyond the state's ability to pay for them. In many Eastern European countries since the collapse of communism there has been tangible movement toward the withdrawal of the state from public services.

[10] Kornai, J.: *A hiány* (The Shortage). Budapest, 1982.

But this withdrawal often occurs without either well-defined political concepts or elaborated theories. The post-communist countries are often called as "premature welfare states" [11]

Although laws in the post-Communist countries still emphasize the state's responsibility, this tendency by the state to withdraw from public services is increasing. Moreover, with constitutional and administrative regulations emphasizing that the state has a high-level of responsibility to support certain public services, how can the withdrawal of political support and funding for public services be justified from a legal standpoint?

A main purpose of this study is to shed light on whether changes in the provision of public services since the transition are more heavily influenced by American or Western European traditions.

1.3.2. Local Governments during the Transition

Territorial governments in the communist regime were established on the so-called "democratic centralism" of the soviet model.[12] This system was neither democratic, nor did it represent real local interests.

Territorial governments were put under dual subordination: subordination to higher territorial governments and their own elected council.. Election of the members of the council was formal, due to the lack of competing candidates. The Communist political party nominated the members of the council and appointed the executive board or the administrative apparatus. Hegemony of the communist party prevailed in the affairs of territorial governments.

Issues of territorial governments were heavily regulated by central laws, or decided by central public authorities. Territorial governments did not have the right to decide about local matters, but were obligated to implement central tasks. Instead, decentralization, which means a devolution of functions of state to autonomous territorial governments, and deconcentration were widespread. This latter terminology implies shifting governmental functions to the local level within the hierarchical system of state bureaucracy.

Structure of territorial governments were based on sectorial administrative means. Local tasks were performed by the enterprises owned and closely controlled by the territorial governments. Territorial governments were administered by the executive board of the higher territorial government, the last resort in the sectorial ministry.

[11] Kornai, J.: *Az egészségügy reformjáról* (Reform of Health Care). Budapest, 1988.
[12] Illner, M.: *op. cit.* 7–42.

Local finances were a part of the state budget, in a restricted finance system. Territorial governments did not own property, but merely handled state-owned assets.

The bureaucratic system of vertical subordination in territorial government degenerated into a system of networking where personal political relationships played an important role. In other words, contributions to local services were negotiated informally between the territorial governments and high level political administrators.

Autonomous local government systems were established in the Post-communist countries at the beginning of the transition, due to a high expectation of the public toward democracy and localism. In this system local governments are required to organize local public services in their own scope. Local governments are the local political power with the right to decide in local matters.

However, a tendency toward maintaining some degree of centralism or even one toward centralization can be observed. Central governments intend to maintain their control over territorial political and economic development. A question is, whether constitutional and other legal regulations can give a guarantee to the decentralized power of local governments.

2. Privatization Issues

2.1. Privatization Conceptions

2.1.1. Conservative Way for Privatization

Conservative theories for privatization hold that local governments began shouldering more public services than they could effectively manage.[13] In this view the principle of free choice is violated, because services are provided by local governments and not the marketplace.

This privatization theory maintains that only market values, such as competition, profit-orientation, private participation, etc. can enforce economic efficiency. Another public interest, i.e. customer-oriented public services can be better served, too, when public services are put under market-based operation.

[13] Savas, E. S.: *Privatization–the Key to a Better Government.* London, 1987. 47–49.

This theory holds that local governments should provide better quality public services from decreased taxes. High redistribution is thought to be unjust. Free choice and efficiency due to competition reduce costs.

Privatization is thought to be able to be implemented only if the tasks of local governments are in fact decreased.

To achieve these goals, local governments should cut their budget by withdrawing from public services and encourage business firms to provide them. When competition is established, and monopoly positions are diminished in the market of public services, competition supervision, price regulation and quality control of local governments will not be needed. This results in a cost reduction in the budget of local governments.

When privatizing public services, local governments should establish a new relationship, the so-called "public-private partnership" with the business sector. That implies an interactive relationship for cooperation, in which local governments hold responsibility for the provision of public services, while utilizing the initiative and creativity of private firms. Local governments will be responsible directly to the customers, when public services are subject to market principles.

This style of privatization may not mean transferring public services entirely to the private sector. Instead it results in shifting to a so-called "regulated market" where local governments, as organizers, can assign the operation of services to private enterprises, as providers. In other words, the public services market is under the oversight of local governments, so that the accountability of local governments can be maintained.

The general opinion in the US is that local governments shouldering the provision of public services is an unfavourable political decision. With few exceptions, services can be provided by business firms in a competitive environment. When a fee for the services can be charged, privatization is avoidable. Only payment for the services can assure rational consumption. There are tax-based services, such as public lighting for which a fee cannot be charged. Opportunities for privatizing these services are more limited, but are possible by contracting out.

If most public services are provided under market conditions, the poor are excluded from their consumption. However, social welfare issues cannot be a reason why local governments should provide free of charge or low price services. Social welfare policy can be executed by other means, such as subsidies, social aids, vouchers, or charity, etc.

US social policy never intended to provide more than a few governmentally administered welfare programs. This is in line with the belief of many that poverty is in many ways the fault of the individual, not the result of social

inequality. The Constitution acknowledges the political, not social or welfare rights of citizens. With few exceptions, local governments are not bound by law to provide welfare services.

2.1.2. Left Wing Privatization Policies

As opposed to conservative theories, left wing policies for privatization consider that local governments must assure the public interest, by meeting not only requirements of quality and continuity, but the general availability of public services, as well. Local governments are a type of public authority based on hierarchy in the government system, for their operation is inconsistent with entrepreneurial principles. Besides, local governments are closely connected with politics, and less dependent on customer decisions.

Local governments have to shoulder the provision of those public services, too, that are not profitable. In most public services, for example, non-competition is unavoidable. For example, institutions for the homeless people, or public lighting cannot be easily shifted to a competitive environment or performed on a fee basis. Local governments must exercise control over quality and costs.

In Continental Europe, public interest is the reason cited for the state's responsibility to shoulder welfare programs. Social rights are mandated in many national constitutions, and European Union treaties. Under public law, welfare belongs to the public sector. It aims to assist the poor.

In contrast to US conservative theories, left wing policy claims that there is justice in providing welfare services because these services are based on fair redistribution. Application of business principles in welfare services is inconsistent with solidarity. To this way of thinking, freedom means recognition of social citizenship, including the rights of individuals to be protected from inequality brought about by the market.

2.2. Privatization Means

2.2.1. Spontaneous Privatization

Spontaneous privatization takes place, when local governments entirely withdraw from the provision of certain services. The withdrawal of local governments gives way for business enterprises and charitable organizations to provide these services. Local governments may encourage citizens' voluntary organizations to provide public services, or individuals to manage the services on their own. This way to privatization is supported by conservative theories, rather than by left wing policies.

2.2.2. Dissolving State/Local Government Monopolies

In conservative theories privatization is completed when competition is established in the area of a former monopoly. Business firms are considered to provide the best quality service at the lowest price, due to the profit motive. Profit orientation can allocate financial resources in the most effective way.

When competition cannot be established and profit-oriented firms cannot be employed, competition can be imitated in the following way:

- Some local public services, such as drinking water supply, for example, are natural monopolies, where competition would contradict economic rationality. Public tender is invited by local governments in these cases. The right for the operation of the local public service will be awarded to that applicant giving the best offer: lowest price and best quality. Inviting public tender can assure equal opportunities and hinders corruption.
- When a market-based fee cannot be charged for a particular service (as is the case for services for drug addicts, or maintenance of public roads) local governments have to subsidize the provider of the service. The price of the service is regulated by local governments, or stipulated in the contract made between the local government and the provider. The regulated or contracted price should guarantee reasonable profit and prevent monopoly pricing.

2.2.3. Non-profit Enterprises

Local governments often assist non-profit enterprises in providing public services for several reasons. Non-profit enterprises are encouraged to provide public services, when privatization policy holds welfare as inconsistent with business-like activity. Many Americans consider non-profit organizations to be more reliable than for-profit businesses, especially when customers cannot judge and choose the quality of services. Consumers of non-profit services can benefit from qualities such as flexibility, autonomy, customer-oriented services and satisfaction of special needs.

2.2.4. Application of Contracts

Local public services can be contracted out, as a way of establishing public-private partnerships. Local governments entitle private enterprises to operate those public services which were previously local government monopolies in franchise or concession contracts. Contracting parties stipulate the most important conditions of the provision of the local public services, such as quality

requirements, continuity, general availability of the services, supervision by the local government, termination, compensation, duration, etc.

Contracts are used for keeping local government supervision over the privatized service, so that interests of the public may be maintained. In some cases local governments tend to have the majority of the business shares in the business firm to which the right to provide the service has been awarded. In law-governed administrative systems laws often regulate privatization conditions as obligatory elements of the contracts for the local governments.

2.2.5. Regulated Market

Health care is a special field of local public services in terms of having three members in its provision. Finances of health services are based on insurance principles everywhere. Insurance can be private (as is the case in the US, or the additional insurance in the publicly financed systems) or public (as is the case in the national health insurance or the state budget systems).

According to the American practice, health services are one of the most marketable services. Even in this business oriented health system, health services are not provided entirely under market principles. Social welfare issues, or other market failures, such as externalities: epidemic, lack of insurance, are to be avoided by regulations.

For this reason, the governments provide free health services for the poor and elderly. The poor cannot afford to pay the market price for health insurance. The elderly should pay expensive health insurance, because they constitute a high risk and cost for the business-oriented insurance companies. Some health services, such as vaccination, are obligatory when epidemic needs to be avoided.

State intervention is applied to health care in order to solve market failures. However, state regulations in the market of health care can occur in many ways.

In the US, health care providers are obliged by law to provide free health services for poor and elderly people. The price of these free health services is regulated and paid by the government. This government intervention represents welfare issues. Any national health insurance system based on citizens' mandatory contribution would limit customer choice and increase taxes.

Health services in Europe are local public services, but financed by a national insurance-based system. Economic efficiency is also a most important issue of the privatization here. Several variations of market mechanisms vs. state regulations can be developed as a result of privatization.

However, the privatization of health care is unlikely to alter the public finance systems in Europe. This is because central and local governments have to respect health services as a universal constitutional right when organizing

health care. Solidarity as a public interest which privatization policies have to observe implies that health services should be generally available for all citizens. Mandatory contribution of citizens to health care should be retained.

Opportunities for privatization are limited in European health care. A regulated market can be established in the three segments of health care: regulation, finance and service.

Competition can be established between health providers for acquiring financial resources from the national health insurance. Insurance companies purchase health services of providers on the basis of the quality of the services. Both health providers and health insurance companies compete for clients, which certainly results in a better quality of health services.

Health care providers may operate in the form of privately-owned business associations or non-profit organizations. Without the direct control of local governments, health care providers can make more rational economic decisions.

Prices of health services are often regulated in the public finance systems, due to the requirement of global cost containment. Prices of health services are based on complex incentives in order for health care providers to be able to provide health services of the best quality and most efficiency.

2.3. Privatization Tendencies in the Post-Communist Countries

Reflecting the policy of developed Western countries, former political elites in post- Communist countries have attempted to develop a so-called "premature welfare state" theory. The communist government promised much more welfare than it was capable of realizing. Welfare kept at the level of early communist states was unrealistic in the 1990s.

This circumstance gave impetus to the political elite to withdraw from public services. However, the "premature welfare state" theory misinterprets "non-intervention" of privatization policies. Non-intervention does not mean the radical withdrawal of the state from public services.

Some post-Communist authorities have attempted to decentralize and privatize public services in order to modernize the system. Welfare services are insufficiently provided by local governments. But replacement of state-welfare services by so-called self-organizing institutions has not taken place: instead, serious deterioration of welfare has occurred. Welfare privatization in the post-Communist countries has been fairly limited. The civil sector is not sufficiently developed to allow the state to withdraw from providing welfare services.

Due to a lack of state funding, some welfare services have been shifted to business firms. Market conditions have been created, but there are relatively few private initiatives in the field of welfare, since the majority of citizens do

not earn enough to pay for them. In the wake of transition, social policy depending on privatization is not an attractive prospective for the near future.

During the communist era, infrastructural local services operated under strict administrative supervision in the form of state-owned enterprises. The prices of services were low or free of charge, due to the "paternalist" philosophy of the communist state. Profitability was not an issue in the system, because the state subsidized the losses of its state enterprises.

Some of the infrastructural local services were put under market-based operation as a result of privatization. Supervision of local governments over the privatized service should be maintained. There is a conflict between the profit interest of the private firm and the public interest of local governments. Public interest is identified as good quality, low price, the continuity and availability of services. The interest of the private firm is to achieve the highest possible profit.

When public service providers are in a monopoly position, they are also in a position to increase the price of services, while decreasing their quality. Abuse of the monopoly position can be controlled by competition, the supervision of which is exercised by a central administrative authority. In the absence of competition supervision, local governments should regulate prices and control the quality of services. Local governments, however, do not have sufficient management skills to balance between public and private interests.

When privatizing infrastructural local services, local governments have to impose new local taxes, or increase the price of services, so that the profitability of the business enterprise is ensured. Citizens are in most cases unwilling to pay more for better-quality service. Local governments are more interested in maintaining the status quo, i.e. local public services at low price and bad quality, than in managing political tensions caused by higher taxes or prices.

As a result, the privatization of local infrastructural services is insufficient in post-communist countries, due to the lack of management skills and funds. Most of local infrastructural services are still insufficiently provided by local government-owned enterprises.

3. The Hungarian Case

3.1. Questions of Autonomy in the Legal Regulations

The first issue to be explored if local governments have autonomy in the legal regulations to organize local public services.

Optional local public services

Act LXV of 1990 on Local Governments determines local public services that municipal local governments provide. They are as follows:

settlement development and management, environmental protection, housing, canalization, maintenance of cemeteries, local public roads and public places, local public transportation, public sanitation, fire protection, public safety, energy supply, employment management, primary education, health care, welfare services, children and youth care, public education, sport, public health.

It is up to municipal local governments if they shoulder the aforementioned tasks or not, and if so, how and in what manner. Municipal local governments should respect local needs and take their financial possibilities into account, when making decisions on the provision of local public services.

Compulsory local public services

Act LXV of 1990 on Local Governments identifies compulsory local public services as follows: drinking water supply, primary education, primary health care, primary welfare services, public lighting, maintenance of cemeteries, local public roads

Municipal local governments are obliged by Act LXV of 1990 on Local Governments to provide the aforementioned services. However, this act does not say how and in what manner. It is left to the discretion of municipal local governments, unless another act regulates the provision of these services. However, each of these compulsory local public services is regulated by sectorial acts. Sectorial acts regulate in detail the quality and fees of the service, applied contracts, supervision of the provider, etc.

Moreover, Act LXV of 1990 on Local Governments entitles acts to determine other compulsory local public services. Only a few local public services, such as public sanitation, can be mentioned, when another act other than Act LXV of 1990 on Local Governments obliges municipal local governments to provide a local public service.

The extent of the settlement, its population and other specifics should be taken into account when a local public service is declared compulsory. In other words, local governments are equal when exercising rights, but differentiated when laws determine obligations for them.

Act LXV of 1990 on Local Governments obliges the county local governments to provide local public services, when municipal local governments are not obliged by laws, or are unwilling to provide them. Municipal and county local governments should make an agreement regarding which one of them will provide local public services.

Act LXV of 1990 on Local Governments lists compulsory local public services for the county local governments as follows: secondary education, public education, sport, child care, sport, secondary health care, secondary welfare services, environmental protection, employment management.

Conclusions

The conclusion based on the relevant legal regulations can be made regarding the autonomy of local governments that local governments *have little freedom to choose which local public services to provide.*

Local public services to be provided by local governments are listed by Act LXV of 1990 on Local Governments or other acts. Almost all of them are declared compulsory. Some of them are compulsory for municipal governments, and others are subject to agreement between municipal and county governments, as to which one will provide them.

Local governments have *more freedom to decide how and in what manner they provide local public services.* The minimum quality and types of some local public services, such as health care, child care, welfare services, drinking water supply, education, are heavily regulated by sectorial acts. Other local public services are typically not strictly regulated by laws, or if so, it is optional for local governments whether they follow these rules, or not.

3.2. Constitutional Protection for Local Government Rights

Constitutional rights of local governments relevant on the provision of local public services are as follows:

- Right to make decisions in regulation and management. Local governments have the right to pass decrees and resolutions in local government affairs. Their decisions can be supervised only regarding legality.
- Right to exercise property rights, such as pursuing business-like activities, discretion in using income, selling, buying, leasing their own property, etc.
- Right to have financial resources proportional to tasks. Local governments have the right to impose local taxes, and receive state subsidies.
- Right to form organization and operation of local governments.
- Right to association with other local governments.

The Constitution entitles the Parliament to detail the aforementioned rights in Act LXV of 1990 on Local Governments. *The main rights of local governments for providing local services are:*

- Offering to provide voluntary local public services, if they are not declared by law as the responsibility of some other public authority.
- Cooperating with the civil sector in performing local tasks.

- Establishing local government institutions, business associations, and nonprofit organizations to provide local public services. The director of the organization shall be appointed by the local government.

The legal method for enforcing the constitutional rights of local governments is that the Constitution prohibits the Parliament from violating those rights listed in the Constitution and Act LXV of 1990 on Local Government when passing acts.

As mentioned earlier, sectorial acts often regulate in minute detail how local public services should be provided. When these acts determine quality, technical, and other requirements, the withdrawal of the right to make decisions by the local governments does not arise.

Violation of autonomy is more problematic, when an act regulates privatization issues. The local governments exercise all the rights to make decisions, when establishing a local governmental institution to provide local public services, appoint and recall its director, finance and closely control its activities. When privatization happens, the connection between local governments and providers necessarily becomes loose.

This is because privatization, as a way of modernization, contradicts the traditional bureaucratic administrative means. Market principles, such as competition, business-like activity, incentive, etc. cannot be manifested in the operation of the local government institutions. Local governments are expected to establish a new relationship with the business and civil sectors when privatizing local public services, too.

If local governments exercised all the rights of decision making in the provision of public services, the implementation of privatization would be impossible. For this reason, the central government tends to keep the rights to vindicate its preferences when regulating privatization issues by acts.

Central governments in most cases cannot give up control of the privatization processes of local governments, because the Constitution makes the central government responsible for certain local public services. This is the case when the Constitution regulates the right to health and welfare as constitutional rights, and obligates the central government to guarantee these rights for the citizens through organizing the health care system, national insurance and institutions as a safety net.

When the central government decentralizes certain public services to the local level, it does not mean that it can totally give up accountability for these services. Control over local public services by the central government can occur only by legal regulations. The tendency of the central government to influence local matters through legal regulations is closely related to the

centralized and law-governed character of the Continental European public administration, as well.

Constitutional rights of local governments can be violated by an act on privatizing local public services in two ways:

The act withdraws the right to decision-making from the local governments
A privatization act often determines the legal form, i.e. business association, not-for-profit company, etc., of the local public services provider, based on the preferences of the central government. It may be thought, for example, that economic efficiency of certain local public services can be assured only in the operation of a profit-oriented company. Or, on the contrary, only a not-for-profit nature of the local public service provider can guarantee welfare issues.

Conditions of the privatization contract to be made between the local government and the local service provider can be regulated by acts, too. Contracts are an important applied privatization means, which give the opportunity for the local government to keep supervision over the privatized service. Central legal regulations often establish obligatory elements, such as the fees for services, general availability, exclusive rights of operation in a given area, procedure for public tenders, etc. to be stipulated by the contracted parties.

The right to operate local public services is in most cases a monopoly of the local government, which can be exercised by a private firm only by concession or license. Getting the right to operate may be the condition for acquiring state financial resources. To choose the private firm to be awarded is evidently left to the discretion of the local government, although the central government may establish incompatibility in the activity of the private firm: e.g. the pharmaceutical industry cannot buy business shares in hospitals.

The act violates the right to property of the local governments
When local public services are privatized, the property of the local government has less relevance, because the emphasis is on awarding the right for the operation to the private firm. Local public services are generally not connected to public property of high value, like the energy supply, telecommunications or the highways, for example, so sale of the publicly-owned property less frequently occurs. Health care, water supply and housing may be mentioned as exceptions.

The privatization policy of the central government may aim to decrease private property in the field of a local public service, e.g. sell the local-government owned flats to the tenants. It is possible that the central government intends to establish favorable conditions for the purchasers, e.g. low interest credits in long term or low price for doctors to buy business shares in health institutions.

Local governments may be required by government policy to lease the building free of charge, where the local public service is provided.

The acts on finance affairs do not assure sufficient financial resources for the local governments to provide local public services

The act on the annual state budget may decrease general or targeted grants to be generated for local governments. In many cases, local public services are financed partly by the state budget, or the national insurance, and partly by local governments. Local governments are often not entitled by acts, either, to impose local tax sufficient to finance local public services.

Acts on privatization passed by the central government were in some cases challenged before the Constitutional Court, referring to the violation of the rights of local governments. The Constitutional Court has to balance its decision on the basis of rationality between two interests: the autonomy of the local governments and the influence of the central government to perform certain reforms.

The Constitutional Court stated in its decisions that the autonomy of local governments is not absolute and unlimited. Acts passed by the Parliament cannot withdraw local government rights or limit them in a manner so that they lose their inherent meaning. This means the legal provisions protecting the autonomy of local governments from the central government.

A local government right is not only manifested in the single right to decision-making. Instead, it entails a complex array of points, including the right to make decisions. When some of the decision-making rights are withdrawn, but the local governments have enough leeway remaining to make decisions that hold responsibility contingent on the performance of their tasks, the constitutional rights of local governments are not violated. The Constitution Court should case by case consider if right to decision of local governments is in fact violated.

Local governments' right to property may be limited if it is related to an important local public service. The public policy of the central government to improve local public services is an important public interest serving as a base for the limitation of the right to property. However, the act can not oblige the local government to sell its property, because that would mean an entire withdrawal of the right. When property rights are limited, local governments should receive compensation in proportion to the limitation.

The Constitutional Court states in its decisions that it is up to the discretion of the central government to establish a finance system for the local governments, provided it is in the form of Parliamentary act. If ministries or other public authorities, such as the national insurance, decide case by case about the grants to be generated for local public services, the autonomy of the local

governments is violated. This is, however, a formal, not a content, requirement for the legislation.

It is vague to judge from a legal point of view if the funds available for local governments are sufficient to finance local public services. It seems to be the constant interpretation of the Constitutional Court that it should be up to the financial possibilities of the state budget to determine in which manner local public services will be financed by the state. Along this line, the Constitutional Court made the conclusion, too, that it is a professional, rather than a legal issue, that what kind of finance system is created by the state to subsidize local public services.

Only in extreme cases do finance affairs become constitutional issues: if local public services cease to exist, due to insufficient financial resources. Regardless of the insufficient finances issue, local governments remain responsible for the provision of local public services. It is involved in the interpretation of the Constitutional Court, that decreasing grants to be generated for local public services by the state budget does not mean the violation of the right to sufficient fund of the local governments.

Conclusions

There is a tendency by the legislation to centralize local issues by passing privatization acts that withdraw local governments' rights. Local governments try to keep their autonomy from the central government when acts violate their rights. The Constitutional Court tends to protect the rights of local governments on decisions and property in its interpretation, but much less readily admits their right to sufficient income to provide local public services.

As a result, the central government is not legally liable to decrease the funds to be generated for the carrying-out of local tasks. Local governments have relative freedom to decide how they organize local public services. There is a tangible tension between the central and local governments due to the efforts of the central government to implement its preferences by urging reforms in the field of local public services. Financial resources for local tasks, however, are more and more in short supply.

3.3. Financial Autonomy of Local Governments to Provide Local Public Services

Three issues of financing local public services should be answered:

- Whether local governments are autonomous in their financial decisions when managing local public services. To judge this requirement, the proportion of local governments' own revenues against their entire revenues

should be compared. Local taxes in the own revenues are also important to consider. The proportion between normative versus special grants is not randomly established.

- Whether local governments possess sufficient funds to provide a wide range of local public services dictated by local needs. This is a complex issue, which needs to take into account not only local governments' share in GDP, or the characteristic proportion of local government revenues, but the level of decentralization and local tasks, as well. Whether local governments depend too much on the state budget, which can decrease grants needs to be considered.
- Whether the finance system assures efficiency and good quality of local public services. Finance systems should be based on incentives. For example, if the local government system is fragmented, or finance is targeted at differentiated tasks, funds cannot be used efficiently (spill over effects) The promotion of market principles, such as competition, the involvement of the business and civil sectors is the best way to assure high quality service.

3.3.1. Rights to Economic and Financial Autonomy

Act LXV of 1990 on Local Governments declares that local governments shall provide local public services. In order to manage them, local governments:

- Dispose their own property, administer their budgetary revenues and expenditures. They are entitled to independently manage their own economic administration in the framework of finance laws.
- May choose how they maintain their own budgetary organization (local government institutions) support private entities (business associations, non-profit organizations) purchase services by any other means.
- Have the right to their own revenues, shared taxes and support from the state budget. The budget of the local governments is part of the public finances. In other words, this budget is distinct from the state budget, but is linked to state subsidies and other budgetary ties.

On the basis of the provisions of the Act, local governments are fairly free to administer their economic activity and choose ways of providing local public services.

The question is whether local governments have real financial autonomy in the current public finances to provide sufficient local public services set by laws and local needs.

3.3.2. Assets of Local Governments

State-owned assets of local public services, such as some of the utilities, health care and welfare institutions, schools, etc. were transferred to local governments at the beginning of the 1990s. The assets of local governments may be real estates and financial assets (shares).

Assets related to local public services are primary assets of local governments. Some of the primary assets, such as local roads, public parks and squares, are completely unsalable. Partially salable assets are the utilities, public buildings, and local government institutions.

The selling of negotiable assets of local governments or providing them as contributions in cash to business associations may be limited by local governmental decrees. Otherwise local governments have the right to exercise property rights, similarly to private persons.

3.3.3. Own Revenues

Local governments have the right:

- To pursue business-like activities with their assets and can have profits, dividends, interests and leasing fees deriving from this. However, business-like activities may not jeopardize the provision of local public services. The accountability of local governments in business associations may not exceed their contribution in cash. Local governments may raise loans and issue bonds, too.

These afore mentioned capital revenues have increased from 4% to 16% in the total local budget during the last 10 years.

- To levy their own taxes, fees, and environmental fines. Local governments are empowered to decide which types of local taxes to levy in the framework of available local taxes regulated by Act C of 1990 on Local Taxes. Rates of local taxes can be determined within legal limits. These revenues have increased from 16% to 24% in the total local budget, due to the increase of local taxes.
- To have shared revenues with the state, including shares from individual income and vehicle tax. The percentage of shared revenues has not changed.

3.3.4. Grants from the State Budget

- Normative grants form the major part (70%) of all subsidies from the state budget. The annual act on state budget fixes the amount of normative grants each year. The allocation of normative grants is based on need-based (local

unit expenditure) and per capita-based (number of inhabitants and defined age cohorts) measures.

Normative grants, however, are not based on actual costs, in terms of contributing just a part of the actual costs. One type of the normative (population-based) grants may be allocated to any local public service, such as the maintenance of health institutions, communal services, etc. The other type of normative (per capita based) grants may be allocated only for specified purposes, such as each social welfare service and educational institution.

- Targeted and addressed grants are specified by Act LXXXIX of 1992 on Targeted and Addressed Grants. Targeted grants are established for important public goals, such as solid waste disposal, or medical instruments, for example, and will be given if the applicant local governments meet the conditions.

Addressed grants are discretionary and support specific investments with high capital intensity, such as the reconstruction of hospitals.

- Poorer and less developed local governments with unbalanced budgets resulting from external factors receive special state grants.

The normative and specific grants have decreased from 50% to 30% of the total local budget, due to the decrease of normative grants. This decrease is from 20% to 13% in the state budget.

3.3.5. Transfers from other Public Authorities

Funds are obtained through transfers from other public organizations, i.e. National Health Insurance, for the management of health services. Reform conceptions in Hungary agreed that solidarity in health care should be maintained. In other words, health services should be available for all citizens and contribution to health care should be proportional to their income, while health care provision is equal, regardless of contribution.

To achieve this goal of solidarity, instead of the former state budget system, national health insurance was established.[14] The national health insurance fund is formally independent of the state budget, but in fact the act on the annual state budget determines its sub-areas, such as medicine, primary, secondary health services, preventive healthcare, etc. The state budget subsidizes the national health insurance fund, too, when it makes a loss.

[14] National Health Insurance is preferred in the Continental Europe. This is because it is clearer for the customers how their contributions will be spent on health care, if the national health insurance is separated from the state budget, than if it is up to day-to-day political decisions as to how health care will be financed from the state budget.

Health care providers are under dual finance in the current finance system: Their maintenance is financed by local governments, whereas their services by the National Health Insurance Fund. Local governments are obligated to provide buildings free of charge to health care providers, even if the health care providers are privatized. Local governments receive population-based normative grants from the state budget for the maintenance of health institutions. Addressed and targeted grants are also available for this aim.

Conclusions

Conclusions that can be drawn from the financial autonomy of local governments to provide sufficient local public services are as follows: financial autonomy is much less assured in the current finance system than where the decentralization of local public services is determined by legal regulations.

- Normative grants dramatically (by 40%) decreased, although capital revenues increased by 400%, and local taxes have become more important. (150% increase) These latter increases of own revenues compensated for the decrease in normative grants.
- Local governments are still fairly dependent on the state budget. The percentage of grants of the state budget in the total local budget is still high (30%). Furthermore, the state has an unlimited right to decrease it year by year in the annual state budget. Measures of normative grants are not differentially calculated and are not adjusted to the real local needs.
- The percentage of local taxes is still low (9%) in the revenues of local governments. Fees for local services are not typical, (1,5% at present) due to the paternalist traditions of the communist era. Increasing capital revenues (15% at present) is not supported by public policies, since it is local governments that are considered to have the responsibility to serve as public authorities rather than entrepreneurs.
- 50% of state grants are targeted and addressed grants. Normative grants are based on types of local tasks, too. This does not give local governments freedom to decide on how and in what manner they manage local tasks. The principle of "one service–one provider" is the rule: finance is based on the type of services, which does not encourage the establishment of providers providing complex services.
- The efficient allocation of funds by local governments to manage local public services is not an issue in the current finance system. Using business principles as a way towards efficient local public services is not supported. Collecting fees for local services, especially for welfare services, which could assure reasonable consumption, is not accepted by the public.

Unions of local governments, which could compensate the fragmented local government system in the provision of local public services, is not promoted by the finance system, either.

Health care is the only local public service where the lack of efficiency and quality of the services has been the most apparent and has led to serious political tensions, such as demonstrations, a main subject of elections, etc. Although the public finance of health care in the GDP has decreased only by 1% of the GDP (from 5,9% to 4,9%) during the last 10 years, citizens experience a dramatically worsened quality of services.[15] Health care is considered under-financed and wasteful at the same time.

3.4. Problems of Regionalism and Fragmentation

Regionalism has not developed in the Hungarian public administration yet, but the local government system still operates in the traditional structure. This local government system is considered fragmented in terms of being insufficient when local public services are provided.

Attempts at reforming the local government structure have been so unsuccessful, because the local government act can only be amended by an act adopted by the qualified majority vote of parliament, for which a consensus between the government and opposition parties has not even once been created.

In 2006 a government decree referred public administration offices to the county level, altering their classification as county capital. In 2007 though that government decree was annulled by the Constitutional Court.

European Union directives, however, require the creation of the regional level between the central and territorial ones. The region is not only a public administration unit, but also a new territorial unit of economic development. European Union grants are often bound to region development.

In the Hungarian public administration system – without the emergence of a constitutional problem, only units on the regional level, such as e.g. region development councils could be created which were not local government bodies, i.e, were not delegated a public authority's scope of responsibility and are not local representation bodies.

[15] The total costs of health care (public and private finance) decreased only by 0,7% due to the increase of private distribution (0,5%), such as under-the-table money, medicines, private clinics, etc. Citizens increasingly have to contribute to their health care from their private resources. The percentage of both the public finance and the total costs in the GDP is very low compared to OECD countries.

In the present local government system in past years, two new public administration entities have emerged: the small region and the district centre. These two public administration entities are not regulated by a unified law, furthermore even an amendment of the local government act has not occurred, only certain sectorial acts confer public authority responsibilities onto this level. In these cases acts also stipulate, with a taxative enumeration of municipalities what territories small regions or district centres extend to.

Municipalities operate in each settlement, such as villages, towns, cities, and in the counties and the capital of Hungary. The local governments of counties and the capital serve as superior administrative authorities to decide administrative cases, when administrative decisions from the first level are appealed.

Local governments of the counties and the capital have their own tasks to provide local public services, too. This is the case when the local public service requires special professional specifications, such as hospitals and secondary schools, for example. The local governments of the counties and the capital are obligated by the act to provide certain local public services, when local governments of smaller villages or towns do not provide or are not capable of providing them.

This system is not sufficient when dividing tasks between the local and county level, because it does not take into account the territory where public services are provided. It does actually occur that people living in the territory of a local government consume a public service provided by a county local government, without contributing to that service through their local government. (spill over effects)

Act LXV of 1990 on Local Governments declares freedom of association for local governments and regulates the cooperation of local governments in the following way:

- The position of a common notary can be established when the population of the neighbouring settlements is below 1000–2000.
- Local governments may establish associations in order to implement their common task more efficiently and sufficiently.
- Local governments may establish supervisory associations for the foundation, maintenance and development of a common organization. Local governments make an agreement in which they stipulate the legal form of the organization, their financial contributions, types of the services the association will provide, and other rights and obligations.

The local government associations are regulated by the act, for it is a generally accepted view that local governments of small settlements are not capable of providing most of the local public services. However, when local governments

associate, they can better perform development programs of the given area, more easily acquire financial resources through tenders, or from the state budget. Also the provision of local public services, such as water supply and waste water management, cannot be sufficiently adapted to the territories of local governments.

Nevertheless, Act LXV of 1990 on Local Governments does provide opportunities to local governments to cooperate with each other in the provision of local public services. Although the management of small areas has little tradition yet. The association of local governments is less frequently applied for providing local public services than it would be expected.

3.5. Management Values and Bureaucratic Structure

Management values are not assured in the structure of local governments. Instead, legal regulations emphasize the implementation of the tasks of local governments set up by laws. The tasks of local governments can be classified as legislative (to pass decrees in the framework of superior acts), jurisdiction (to apply laws when deciding administrative cases), and servicing (when providing local public services.)

When implementing this latter task, the representative body of the local government passes a resolution in which it orders the establishment of an institution or firm to provide the local public service. Also, the representative body is entitled to decide on whether to privatise a local public service or not, or if so, how and under what conditions.

It is the duty of the notary and the office of the mayor to organize the local public service based on the resolution of the representative body. When the local public service is provided by a local government institution it is supervised by a public servant of the office of the mayor. The notary assures only the legality, not the efficiency of the operation.

The only guarantee for efficient operation is that if consumers complain to the representative body at public hearings and the representative body orders the improvement of the service. This feedback, however, does not work well in practice.

Local governments have committees elected from the members of the representative body to deal with special fields, such as health care, welfare, economic, financial issues, etc. Members of these committees are politically appointed, but not experts in the field.

Public servants of local governments are in most cases not trained as managers, either. They consider it more important to keep legal regulations related to the local public service, such as complicated financial rules, technical require-

ments, etc., than efficiency, quality and customer oriented services. This is due to the bureaucratic traditions of public administration and the lack of management values.

Local governments are careful when deciding to privatize a local public service. This is because they do not know how to keep sufficient control over the privatized services.

Privatization has less risk when the local public service is privatized for non-profit organizations, which is the case in the welfare services. Laws determine in minute detail how welfare services should be provided by non-profit organizations.

However, laws do not detail how to supervise a privatized for-profit private firm. A business-oriented private firm is motivated by the profit, not public goals, such as quality, continuity and general availability of the service. Local governments do not have sufficient management skills to balance between these private and public interests. They can easily lose control over the business firms, which may make the customers unsatisfied.

Central government's example of privatizing some infrastructure public services does not encourage local governments to privatize most other infrastructure local services.

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BOOK REVIEW

Vanda Lamm (ed.): Transformation in Hungarian Law (1989–2006) 2nd edition. Akadémiai Kiadó, Budapest, 2009. 230 pp.

Twenty years after the "refolution" (the constitutional revolution that was negotiated over the National Roundtable Talks), a collection of essays which were published in 2006 and were aiming at nothing less than providing an analytic and synthesizing overview of the preceding legal developments were republished–a fact that provides ample evidence for the endurance and validity of the analyses.

The peculiarity of the negotiated regimes changes, like that of Hungary's lay in the fact that law was the very tool that enabled the political and economic transition, and, pragmatically speaking the transition itself consisted of the very process of substantially changing the legal system–a process that obviously did not end by amending the constitution and the most important laws that shaped the political (and economic) structure. In the past years, there is not a single area of the Hungarian legal system that would not have been subject to fundamental changes.

Hungary's new legal order is based on Law No. 1989. XXXI. amending the 1949 Constitution. Although in the past two decades several hundred laws were passed amending and restructuring the Hungarian legal system in the spirit of this substantially new constitution, despite repeated political efforts and a number of drafts prepared and debated by legal academics, professionals, and politicians, no new constitution was adopted. This "old-and-new" Constitution, which still bears the name Law No. 1949. XX., provides the framework a constitutional democracy: the principles of rule of law, separation of powers, political pluralism, market economy, human rights, etc. Actually, it is proverbial that the only provision that remained intact from the initial 1949 text is the one which states that Budapest is the capitol of Hungary.

Nevertheless, the 'constitutional revolution' did not end with the comprehensive amendment of the constitution and other acts (such as the law on the freedom of assembly, association, electoral law, etc.). Over the coming years, in part under the influence of EU-law approximation and the tacit or explicit demands or expectations of international organizations–and thereby obligations set forth by international conventions (such as for example the European

Convention on Human Rights) the reshaping of the Hungarian legal system took the form of a continuous process, where even the constitution was amended several times.

Thanks to the extensive jurisprudence of the Constitutional Court (established in 1990), the new constitutional order had been solidified. Unsuccessful as the attempts to adopt a new constitution were, legislative efforts throughout the 1990's and the first half of the new millennia succeeded in the complete transformation of all other areas of the legal system. As mentioned above, practically all branches of went under a significant change, and in fact, some were reconstituted almost entirely differently.

The initial period of furiously paced and therefore somewhat hastily completed legislative work, was followed by a more consolidated period from around the mid-1990's, when the comprehensive work of redrafting the base-laws of the major branches of law began. This was also made necessitated by Hungary's accession to the European Union–the process of which was underway at the time. The areas affected were: the Civil Code, the Penal Code, the Labor Code, the Act on Criminal Procedure and the Act on Public Administrative Procedures. Beyond meeting the demands of harmonizing with EU law, the new codes attempted to synthesize preexisting legislation and carry out a substantive codification. While a comprehensive overview of the entire process would have been an insurmountable task, in this collection of essays the authors highlight the most important trends and developments that characterize their chosen fields of law.

The first essay in this volume, by András Bragyova, a member of the Constitutional Court, professor of constitutional law at the University of Miskolc and Scientific Advisor to the Institute of Legal Studies of the Hungarian Academy of Sciences, addresses the theoretical question of the extent to which these radical changes permeated the entirety of the legal system, and how changes in the law and the legal system have affected the continuity of the latter. The author argues that although the political changes acted as a catalyst for fundamental–even radical–changes in both the law and the legal system, this did not break the continuity of the legal system. The current Hungarian legal system is the same as its predecessor in terms of its continuity with it, whilst at the same time being fundamentally different from it in terms of its content. The fundamental feature of the legal system, its claim to validity as a legal system had not changed. This claim of validity (which consists of four fundamental claims: being indubitable, exclusionary, primary and unconditional) in contrast to the claim of authority rests upon itself. According to Judge Bragyova, a legal system's validity is identical to its continuity, that is: its norms stay equally valid even if they change. In other words, the continuity-

existence of the legal system is based on the permanence (constancy) of its validity claim. Now, the specificity of regime changing processes is that they have a past-denying aspect. These past-repealing legislations are fraught with the inherent contradiction that they deny the equality of the legal system's validity claim while wishing to uphold the continuity of the legal system. The author argues that past-denying legislations need special justifications and since they bound to come in conflict with the continuity of the legal system; they may only be accepted in "new" legal systems, which are built on breaking the continuity, but not in legal systems like those that went thorough the "refolution" and preserved the continuity of the legal system.

Of the essays investigating changes in specific areas of law, the first one, by *Attila Rácz*, professor of constitutional law at the Corvinus University, focuses on the remodeling of State organizations for legal protection. The reader is guided through the Round Table Negotiations and the various post-1989 stages of institutional reform that concern the newly established or reformed institutions, such as the Constitutional Court, and the ombdus-institutions, the Prosecution's Offices and the judiciary.

The next section, authored by *András Sajó*, member of the Hungarian Academy of Sciences, Research Professor at the Institute of Legal Studies of the Hungarian Academy of Sciences and Professor at the Central European University focuses on legislation and jurisprudence concerning free speech–an issue of central importance to the political transition and the functioning of constitutional democracies. The essay, which provides a thorough overview of the Constitutional Court's case law, is part of a larger project: the scrutiny of the sustainability of liberalism after 1989 in Hungarian law. The author, who since then had been elected as member of the European Court of Human Rights refutes the claim that liberalism necessarily fails as both as a political ideology and a social model and consequently looses its imposed appeal in a clan-based pre-modern society, like the Hungarian. Judge Sajó shows the weak, but nevertheless long roots of liberalism in Hungary–a society which he sees an essentially modern "liberal" society with traditionalist values and patterns of behavior. He also argues that despite illiberal tendencies, as a small state Hungary simply needs to accommodate liberal demands of its European environment. The analysis shows that the implementation of liberalism has not been a linear process, but a set of parallel, only partly interrelated developments, where liberal ideology did not preclude illiberal solutions. Although the analysis of free speech jurisprudence serves as a litmus test for social patterns and attitudes and the test case for the sustainability of liberalism in law, the author adds that free speech (despite being vital for the whole society) is predominantly and elite concern, thus the endorsement of liberal traditions

in this field is not a conclusive evidence to the successful of liberalism in other institutions, public consciousness and behavioral patterns.

The next essay, by *István Balázs*, professor of administrative law at the University of Debrecen, focuses on the readjustment of public administration since the 1980'ies. The political changes also brought a thorough overhaul of the public administrative system as well, with regards to its tasks, competence and organizational structure. There is no area of public administration that has remained untouched by radical change since 1989–1990. The analysis, dealing with this issue emphasizes, that similarly to other Eastern European and East-Central European states in general, the Hungarian process was directed at the approximation of the Western-European model of public administration. The author provides a detailed assessment of the development of the legal framework of local governments, central, regional and local administrative organs, police administration, state audit institutions, the structure of the government, the processes of deregulation, decentralization, along administrative procedure, and the legal, financial and human resources status of the 800,000 state employees[1] and the financial and legal status of the approximately 3100 local governments.

The longest and most detailed section of the book focuses on the area of economic law, a field that where transformation actually preceded the political transition, as the 1988 law on economic enterprises was adopted two years before the first free elections in 1990. *Tamás Sárközy*, professor of constitutional law at the Corvinus University and Scientific Advisor to the Institute of Legal Studies of the Hungarian Academy of Sciences chronicles the development of Hungarian property, economic and business law (including separate assessments on corporate law, the law of foreign investments, the law of bankruptcy, cooperatives, privatization, consumer protection and pricing law, intellectual property, copyright and trade protection law.) The analysis includes financial law (securities, security exchanges, banking and insurance laws along accounting law, labor law, insurance, social security and welfare law. The chapter is divided into three sections. The first part deals with the development of economic civil law in general. The second part scrutinizes (i) company and business law, (ii) privatization law as special division of law unique to the transition process, (iii)banking, securities, securities exchanges and insurance laws, (iv) cooperative and agriculture law, (v) bankruptcy law. The third part focuses on developments regarding the developments of the Civil Code. Despite the fact that in the past five years a significant redrafting of company took place and a brand new Civil Code has been prepared and

[1] Hungary has a population of approximately 10 million people.

submitted to the Parliament, the analysis stops at 2004, because, according to the author, accession to the European Union opens a new phase in the field – as EU economic law has direct effect in Hungary.

The last two sections, by *Ferenc Nagy*, professor of criminal law at the University of Szeged, and *Réka Végvári*, Research Fellow at the Institute of Legal Studies of the Hungarian Academy of Sciences focus on the considerable changes the political and economic transition induced on substantive and procedural criminal law. In order to meet the demands of a constitutional democracy and obligations set forth in international human rights documents, the Criminal Code was amended more then fifty times since 1989 and in 1998 a new Criminal Procedure Code was adopted–restructuring the system of coercive measures (most of all the rules on arrest, pretrial detention, house arrest, and restraining orders) and redrawing preexisting rules on evidence and remedies. Also, a number of new offenses and sanctions (including a range of alternative sanctions) were introduced along the complete reform of political and–partly due to privatization and the transition to market economy–economic criminal law. Further new institutions include bail, witness protection and a form of plea bargain.

The case of criminal law and the Criminal Code (or, likewise, civil law and the Civil Code) show a pattern similar to the constitution and the constitutional framework: severe, structural amendments indeed produce a substantively new (field of) law, which can fulfill its new role to sustain liberal constitutional democracy, even if the official title still revokes "old", pre-transition, and pre-constitutional memories.[2]

András L. Pap

[2] The Constitution is Law No. 1949. XX, the Civil Code is Law No. 1959. IV., and the Criminal Code is Law No. 1978. IV, originally adopted in 1949, 1959 and 1978 respectively.

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